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The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance

Cover Page Footnote

J.D. Candidate 2003, Fordham University School of Law; former Deputy United States Marshal, Eastern District of New York. I would like to thank Dyan Finguerra-DuCharme for her unwavering support and for helping me find the path that lead to this Note. I would also like to thank my father for teaching me about the relevance of psychology at a very early age, and my mother for instilling in me an appreciation for the craft of writing.

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THE SEARCH FOR REASONABLENESS IN USE-OF-FORCE CASES: UNDERSTANDING THE EFFECTS OF STRESS ON PERCEPTION AND PERFORMANCE

*Seth D. DuCharme**

INTRODUCTION

The man lunges from the shadows, his face contorted in anger. His eyes lock with yours as he moves closer. His motion appears strange, as if he is an image on a movie screen and the projector is off speed. The background appears out of focus. The sights and sounds of the world around you change abruptly, supplanted by the sensation of your pounding heart. Your hands tremble. Time seems to slow down. What you do in the next instant could mean the difference between life and death.

Individuals who respond forcibly to such confrontations may face the additional trauma of potential criminal and civil liability. In self-defense and police use-of-force cases, liability turns on whether the individual's response is legally justified. The issue of justification arises in incidents ranging from street fights to police excessive force to domestic violence cases. Each of these areas occupy the courts' dockets, and society's attention.[1] When parties in such cases are brought before a judge or jury, their actions are analyzed by some version of what is commonly known as the "reasonable person" standard.[2] Determining what is or is not reasonable in a violent confrontation, however, is a challenging endeavor.

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1. For example, the names Bernard Goetz, Rodney King, O.J. Simpson, and Amadou Diallo will not soon fade from public consciousness. While these cases are distinct on their facts and involve numerous issues, they are each "use-of-force" cases, focusing on questions about the dynamics and psychology of violence.

2. *See* Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 Am. J. Crim. L. 1, 1-5 (1998) (explaining variations of the reasonable person standard in different jurisdictions); *see also* Victor E.

Scientific studies show that high levels of stress dramatically affect an individual's sensory perception and physical performance.[3] Consultants and expert witnesses can help develop case strategies that take into account perceptual distortions and performance limitations bearing directly on the question of a defendant's reasonableness.[4] While legal and practical obstacles exist, expert testimony can be crucial in effectively presenting a defense of justification or excuse.[5] When a jury is called on to judge the actions of a defendant in a use-of-force scenario, objective, scientific evidence can provide illuminating insight into the factors that affected the defendant's conduct and may be invaluable in accurately assessing whether such conduct was reasonable under the law.

Use of such evidence is currently the exception rather than the rule, however, and the relevant experts, consultants, and scientific studies may be unknown to most lawyers.[6] By looking to the related fields of psychology, neurology, ophthalmology, and motor-skills training, this Note will address the dynamics in use-of-force incidents and suggest ways in which lawyers litigating use-of-force cases can use consultants and experts to bring this information to the jury. Furthermore, this Note will argue that understanding perceptual and performance factors is essential to a better understanding of culpability in use-of-force cases.

Part I of this Note explains the legal standards and concepts relevant to three common types of use-of-force cases, with an emphasis on federal and New York law. First, Part I addresses the

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Schwartz et al., Prosser, Wade & Schwartz's Torts: Cases and Materials 101-05 (10th ed. 2000) (explaining that in civil cases criminal law rules for determining justification are carried over and applied "without much variation").

3. *See* Bruce K. Siddle, Sharpening the Warrior's Edge: The Psychology and Science of Training 76-77 (1995); *see also* Alexis Artwohl & Loren W. Christensen, Deadly Force Encounters 39 (1997).

4. *See* Siddle, *supra* note 3, at 57.

5. *See, e.g.*, Marie McCain, *Experts' Opinions Sealed Verdict: Made Decision to Acquit "Easier,"* Cincinnati Enquirer, Sept. 27, 2001, http://enquirer.com/editions/2001/09/27/loc_experts_opinions.html (crediting testimony of optometrist and psychologist as having persuaded jury to acquit police officer who shot unarmed man); *see also* Robert E. Pierre, *Officer is Acquitted in Killing that Led to Riots in Cincinnati*, Wash. Post, Sept. 27, 2001, at A2, 2001 WL 28359925 (describing general circumstances of trial).

6. In researching this Note, the lawyers I spoke to were invariably surprised to hear of the existence of this science and its application. Similarly, researchers such as Dr. William Lewinski at Minnesota State University report that there is a relatively small number of experts who regularly appear at trial to address these issues. Telephone Interview with Dr. William Lewinski, Professor of Psychology, Minnesota State University (Jan. 18, 2002) [hereinafter Lewinski Interview] (notes on file with the *Fordham Law Review*]. Among reported cases, opinions mentioning incidents of expert testimony about the specific perceptual and performance discussed herein are rare, although there is documentation that such testimony has proven effective at trial. *See, e.g.*, McCain, *supra* note 5.

law concerning a citizen's use of force in self-defense.[7] Second, this part explains some of the special issues that arise when the use of force in question was by police officers.[8] Third, Part I recognizes some of the unique challenges for courts and juries in determining reasonableness in cases of domestic violence.[9] Finally, Part I explains the general legal standards for the admissibility of expert witness testimony.[10]

Part II explains the science behind perceptual, cognitive, and physical functioning in what psychologists refer to as "high arousal" states.[11] By looking to psychological studies on survivors of deadly force encounters,[12] research into perception and cognition[13] and developments in the field of motor-skills training,[14] this part offers a practical perspective on the reasonableness tests and analytic models presented in Part I. Part II suggests that correctly applying the "reasonable belief" standard is much more complicated than the simple statutory language implies.

Part III of this Note presents issues that arise in applying the science to litigation, and addresses situations to which the science is well suited.[15] This part also provides examples of cases where expert testimony and consultation have proven invaluable in assisting litigators.[16] Finally, this part argues that the application of scientific research is critical to fairly and accurately analyzing human behavior in use-of-force incidents, and perhaps all incidents where the parties experience very high levels of stress.[17]

I. LEGAL ANALYSES IN USE-OF-FORCE CASES

The areas of citizen self-defense, police use of force and domestic violence each contain special issues that make them generally distinguishable. The particular perspective of a robbery victim will likely differ from that of an undercover police officer or a battered spouse, because each will carry different experiences, abilities, and responsibilities.[18] The general fact pattern of each type of case will

7. *See infra* Part I.A-I.B.
8. *See infra* Part I.C.
9. *See infra* Part I.D.
10. *See infra* Part I.E.
11. Artwohl & Christensen, *supra* note 3, at 38.
12. *See infra* Part II.A.1.
13. *See infra* Part II.A.2.
14. *See infra* Part II.B.
15. *See infra* Part III.A.
16. *See infra* Part III.B-C.
17. *See infra* Part III.D.
18. The responsibilities and authority of the parties, in particular, may distinguish the reasonableness of their actions. While the authority to arrest is given to citizens by statute under certain limited circumstances, police officers' responsibilities to apprehend subjects logically extend beyond those of citizens. In New York, for example, a police officer may arrest an individual whom he or she reasonably believes

likely be quite different, as well. But when it comes to the critical moment[19] when the individual must make a decision as to whether or not to fight, the human elements and the legal concepts place them in strikingly similar positions.[20] Despite their differences, all are human beings who possess the same fundamental physiological and mental attributes, and all are potentially culpable or liable for their use of force. If the use of force results in litigation and the defense is justification, the robbery victim, the police officer, and the battered spouse will all be judged under some version of a "reasonableness" test.[21] If the fact that the defendant intentionally used force and caused injury is undisputed, justification may be the only plausible defense.[22]

This part explains the basic concept of legal justification in self-defense cases, and address the effects of differing interpretations of key statutory elements, such as imminence and retreat.[23] Next, this part explains how the formulation of jury instructions is critical to the success or failure of a justification defense, and how a court's erroneous denial of an instruction can be a winning argument on appeal.[24] This section then shifts to the related but specialized concerns that arise in police use-of-force cases, including the defense

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has committed an offense, while a citizen may only arrest a person if he or she knows that person to be guilty of the offense. *See* N.Y. Crim. Proc. Law §§ 140.25-30 (McKinney 1998). Consequently, an officer might reasonably be expected to engage a subject whom he did not know with certainty to be the perpetrator of a crime, while a citizen is expected only to engage a wrongdoer "when the latter has in fact committed [an] offense in his presence." *Id.* § 140.30(1)(b).

19. In this Note, the "critical moment" refers to the point in time when the totality of the circumstances presents an actual or imminent use of force, for example the emergence of a raised fist, drawn weapon, or similar apparent indicator that a threat exists.

20. While different people will draw on different experiences in decision-making, and the facts of each case will be different, the common factors will be involuntary human stress responses, discussed *infra* Part II, and the law's reliance on the notion of a "reasonable person" in judging their actions.

21. *See generally* Heller, *supra* note 2 (exploring philosophical and practical concerns in applying subjective and objective standards of reasonableness in use-of-force situations).

22. In New York, for example, the Penal Code describes the crime of assault in plain language that seems to encompass generally and criminalize all acts of physical violence against another person. Section 120.00 states simply: "A person is guilty of assault . . . when . . . [w]ith intent to cause physical injury to another person, he causes such injury." N.Y. Penal Law § 120.00 (McKinney 1998). Consequently, it is not difficult to satisfy the elements of the charge of assault. Elsewhere, however, the Penal Law addresses the defense of justification and calls upon the court to do a balancing test with respect to the social value of an intentional use of force. Section 35.05 states, "conduct which would otherwise constitute an offense is justifiable and not criminal when . . . [s]uch conduct is necessary . . . to avoid an imminent public or private injury . . . . Whenever evidence relating to the defense of justification . . . is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense." *Id.* § 35.05.

23. *See infra* Part I.A-I.B.1.

24. *See infra* Part I.B.2.

of qualified immunity.[25] This part briefly explores the problematic tension between subjective and objective analyses in domestic violence cases[26] and raises questions about the circumstances of domestic violence incidents that will be addressed in Part II. Finally, this part addresses the standards for the admissibility of expert witnesses.[27]

A. *The Concept of Justification*

Justification in use-of-force cases is typically self-defense, defense of third parties, lawful arrest, or some combination thereof.[28] A defendant is entitled to a justification charge if the jury could reasonably find that his or her actions were appropriate under the circumstances.[29] State use-of-force laws[30] generally provide that an individual may use force against another when he reasonably believes

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25. *See infra* Part I.C.

26. *See infra* Part I.D.

27. *See infra* Part I.E.

28. *See generally* N.Y. Penal Law § 35.05 (McKinney 1998) (addressing circumstances where citizens and law enforcement officers may use force to protect themselves, innocent third parties, or to affect arrest); Heller, *supra* note 2 (addressing premise of social utility inherent in permissibility of using force in self defense); V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. Chi. L. Rev. 1235 (2001) (reviewing history and evolution of justification defense and application of analytic standards).

29. *See, e.g.*, People v. Mothon, 729 N.Y.S.2d 541, 543 (App. Div. 2001) ("As a general proposition, a justification charge is proper when, viewing the evidence in the light most favorable to the defendant, the jury, based upon a reasonable view of the evidence, could find that the defendant's acts were justified.").

30. *See, e.g.*, N.Y. Penal Law § 35.15.

> A person may, subject to [provisions], use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he *reasonably believes* to be the use or *imminent* use of unlawful physical force .... A person may not use deadly physical force ... unless: (a) He *reasonably believes* that such other person is using or about to use deadly physical force ....

Id. (emphasis added); *see also* State v. Romley, 836 P.2d 445, 451 (Ariz. Ct. App. 1992) (noting state statute provides that "a person is justified in using physical force against another when and to the extent that a reasonable person would believe that physical force is immediately necessary to protect oneself ...."); People v. Miller, 981 P.2d 654, 658 (Colo. Ct. App. 1998) (noting Colorado self-defense statute allows that a person "may use a degree of force which he reasonably believes to be necessary"); State v. Kelly, 478 A.2d 364, 373 (N.J. 1984) ("The use of force against another in self-defense is justifiable 'when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force ....'"); Commonwealth v. Galloway, 485 A.2d 776, 782 n.3 (Pa. Super. Ct. 1984) ("[U]se of force upon ... another ... is justifiable when the actor believes that such force is immediately necessary ...."); State v. Janes, 822 P.2d 1238, 1242 (Wash. Ct. App. 1992) ("Washington uses a subjective standard ... requir[ing] the court and the jury [to] evaluate the reasonableness of the defendant's perception of the imminence of ... danger in light of all the facts and circumstances known to the defendant ...." (citing State v. Wanrow, 559 P.2d 548, 556 (Wash. 1977))).

he is threatened with imminent,[31] unlawful force and cannot retreat safely.[32] Statutes also permit the use of force to prevent what the defendant reasonably believes is the commission of a serious violent crime, such as a rape or robbery,[33] or to effect arrest after the commission of a crime.[34]

Even if some use of force is shown to be justified, the defendant will not prevail if the fact-finder determines that the amount of force used was unreasonable.[35] But unreasonable to whom? Different individuals may have different opinions and beliefs about what behavior constitutes an appropriate action in response to a perceived threat. Additionally, the defendant's state of mind may be relevant to excusing otherwise culpable behavior.[36]

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31. The concept of imminence is open to some exploration, especially in domestic violence cases where a party may perceive that harm will come to her if she does not take pro-active measures. *See* Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 Loy. L. Rev. 81, 100-05 (2001).

32. *See* N.Y. Penal Law § 35.15(2)(a) (a person "may not use deadly physical force if he *knows* that he can [retreat] with *complete safety*" (emphasis added)). This notion of a duty to retreat should be considered carefully. If the defendant knew he could retreat in complete safety, and did not, justification will not be available if the defendant used deadly force. *See, e.g.*, Davis v. Strack, 270 F.3d 111, 130 (2d Cir. 2001) (holding that there is no duty to retreat if a person reasonably perceives himself to be "one or two seconds" from death and the act of retreating could put him in more danger); *In re* Y.K., 663 N.E.2d. 313, 314 (N.Y. 1996) (holding no duty to retreat arises until threat of deadly force exists).

33. *See, e.g.*, N.Y. Penal Law § 35.15(2)(b) (stating a person may use deadly physical force if "[h]e *reasonably believes* that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery; or (c) [h]e *reasonably believes* that such other person is committing or attempting to commit a burglary . . ." (emphasis added)).

34. *See id.* § 35.30 (addressing "[j]ustification; use of physical force in making an arrest or in preventing escape"). Note that, under section 35.30(4)(b), a private person acting on his or her own account may use deadly physical force to effect the arrest of a person who has committed a rape, robbery, or other listed violent crime.

35. *See, e.g.*, Unites States v. Livoti, 22 F. Supp. 2d 235, 239-40 (S.D.N.Y. 1998) (describing and analyzing the evidence against a police officer convicted of involuntary manslaughter for an unreasonable application of a choke hold).

36. The legal defense of excuse focuses not on the defendant's willful intent, but instead on his or her loss of self-control. In a discussion of the analytic standards in self-defense cases, one commentator observes that excuse "rests on the assumption that either internal pressures . . . or external pressures . . . might so intrude on the actor's freedom of choice that the act committed under pressure no longer appears to be his doing." *See* Heller, *supra* note 2, at 23 (citations omitted) (alterations in original); *see also* Beecher-Monas, *supra* note 31, at 82 n.3 ("The distinction between justification and excuse is 'between warranted action and unwarranted action for which the actor is not to blame' [but] the distinction between justification and excuse is incoherent because in both instances the result is legal exoneration." (quoitng Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 Colum. L. Rev. 1897, 1927 (1984))). The performance and perceptual factors addressed herein may constitute the pressures necessary to establish a credible excuse to otherwise culpable behavior, because they are sometimes so severe as to virtually divorce a person from his or her faculties.

A few courts rely on a subjective standard, crediting an individual's own personal belief as opposed to the belief of a hypothetical "reasonable person" in his or her position.[37] Under a subjective standard, the defendant need only show that he "'did honestly believe it necessary to use force in his own defense.'"[38] Most American courts, however, have traditionally relied on an objective standard.[39] Under an objective standard of reasonableness, the question is "'whether a reasonable person in [the] defendant's circumstances would have perceived self-defense as necessary.'"[40] Under either standard, though, a justification argument depends on a credible presentation of evidence from which the trier of fact can infer a belief that force was, in fact, a *necessary* response, a judgment question with considerable room for uncertainty given the chaotic and unpredictable nature of use-of-force events.

B. *Self Defense on the Street*

1. The Reasonableness Test: Objective or Subjective?

When individuals clash, society is often wary of the underlying motivations that result in violence.[41] For example, courts have taken care to try to separate legal justification from an individual's own personal notion of street justice. In the notorious case of *People v. Goetz*,[42] the New York Court of Appeals addressed the sometimes murky line between subjective and objective standards for evaluating appropriate responses in self-defense situations. The distinction between the two standards played a critical role in the case.

Goetz was initially charged with attempted murder, assault, and possession of an unlicensed handgun in connection with his shooting of four young men on a New York City subway.[43] When the men demanded that Goetz give them five dollars, he shot and seriously wounded them.[44] Goetz was ultimately arrested and charged for his

37. Heller, *supra* note 2, at 56-57.

38. *Id.* at 56 (quoting Moor v. Licciardello, 463 A.2d 268, 272 (Del. 1983)).

39. *See id.* at 4. Heller explains that, while the objective standard is the most prevalent, there is an increasing trend for courts to consider subjective factors with respect to a particular defendant. Heller divides the inquiries into four distinct reasonableness standards: the objective standard, the purely subjective standard, the Model Penal Code standard, and what he calls the "particularizing standard." *Id.* at 5.

40. *Id.* at 8 (quoting State v. Stewart, 763 P.2d 572, 579 (Kan. 1988)).

41. In many notable use-of-force cases, justification is clouded by societal issues such as race and class. *See, e.g.*, People v. Powell, 283 Cal. Rptr. 777 (Ct. App. 1991) (the Rodney King case); People v. Goetz, 497 N.E. 2d 41 (N.Y. 1986); People v. Boss, 701 N.Y.S.2d 342 (App. Div. 1999) (shooting of Amadou Diallo).

42. 497 N.E.2d 41 (N.Y. 1986).

43. *Id.* at 43.

44. *Id.* at 44. Goetz reportedly told investigators that one of the assailants "tried to run through the wall of the train, but . . . he had nowhere to go." *Id.* (alteration in

conduct. The charges against Goetz, however, were initially dismissed because the prosecutor introduced an "objective element" when he explained the charges to the grand jury.[45] The prosecutor instructed the grand jurors to consider "whether Goetz's conduct was that of a 'reasonable man in [Goetz's] situation.'"[46] The remark was nearly fatal to the prosecution's case. Ruling that justification depended solely on the subjective beliefs of the defendant under the circumstances, the lower court found that the prosecutor's reference to a "reasonable man" was unlawful and dismissed the charges against Goetz.[47]

After an illuminating discussion of the legislative history of the justification statute,[48] the New York State Court of Appeals reversed the lower court's dismissal of the charges, rejecting the notion that justification depends only on the particular beliefs of the defendant.[49] Instead, the court noted that the legislature had included the language "reasonably believes" and not merely "believes" when considering the perceptions of the defendant, thus requiring that justification hinge on an objective element.[50] Otherwise, the court admonished, justification could arise from a belief "based upon mere fear or fancy or remote hearsay information or a delusion pure and simple."[51]

The Court of Appeals emphasized that the modifier "reasonable" in the statutory language amounted to a requirement for an objective analysis of the defendant's belief[52] and noted that other states had similarly interpreted such statutory language.[53] Goetz had argued that an objective analysis would unfairly preclude a jury from considering factors with regard to "the actual circumstances of a particular incident," such as Geotz's own history of victimization.[54] The court concluded, to the contrary, that reliance on an objective standard would not preclude consideration of "the background and other relevant characteristics of a particular actor."[55]

The court emphasized the relevance of factors and circumstances "more than the physical movements of the potential assailant . . .

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original).

45. *Id.* at 46.

46. *Id.* (alteration in original).

47. *Id.*

48. *See id* at 48-49.

49. *Id.* at 52-53.

50. *Id.* at 47.

51. *Id.* at 48 (quotations omitted).

52. *Id.* at 50.

53. *Id.* at 51 ("Numerous decisions from other States interpreting 'reasonably believes' in justification statutes enacted subsequent to the drafting of the Model Penal Code are consistent . . . as they hold that such language refers to what a reasonable person could have believed under the same circumstances." (citations omitted)).

54. *Id.* at 52.

55. *Id.*

[and] the physical attributes of all persons involved, including the defendant."[56] Ultimately, the court concluded that the jury's analysis of the defendant's conduct should incorporate both subjective elements unique to the defendant and objective elements of the "reasonable person."[57] The jury should first determine "whether the defendant had the requisite beliefs" to establish justification, and second whether a reasonable person *could have* held those beliefs under the circumstances.[58]

In light of the preceding analytical concerns, it is clear that, in planning a litigation strategy, a lawyer needs a sense of whether the facts of the case can reasonably be shown to justify the defendant's conduct. Essential to the success of the defense of justification is a court's willingness to issue an appropriate jury instruction that will shape the jury's analysis of the facts. If justification is the only plausible defense to a charge or claim against a defendant who used force, then the formulation of the jury instructions may be dispositive. An inquiry into how the court makes a determination as to whether to charge the jury on justification, and what constitutes reversible error, is useful to flesh out the elements of a justification defense at trial, or on appeal, in use-of-force cases.

2. The Critical Role of the Jury Instruction

In *Davis v. Strack*,[59] the Second Circuit recently examined the standards of justification in self-defense cases under New York law. In that case, Ronald Davis appealed the denial of a writ of habeas corpus by the United States District Court in the Southern District of New York. Defendant's appeal raised the question of "whether a trial judge's denial of a jury instruction on justification for the use of deadly force requires that the petitioner's convictions . . . be set aside."[60]

In *Davis*, the Second Circuit carefully analyzed the legal and practical issues that play out in a court's determination of whether a jury instruction on self defense is warranted. The case involved a shooting in northern Manhattan, where a young numbers runner shot

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56. *Id.*

57. *Id.*

58. *Id.* The Court of Appeals' analysis is important to the present discussion because perceptual distortions could be deemed the "mere fear or fancy" peculiar of one particular defendant unless the distortions are presented as factors that would be experienced not only by the defendant, but also by a reasonable person under the circumstances. If perceptual distortions can be shown to be common, human experiences, then evidence of perceptual distortions is relevant to both subjective and objective inquiries.

59. 270 F.3d 111 (2d Cir. 2001) (seeking federal relief from state court conviction for manslaughter and weapons possession, based on lower court's failure to allow jury instruction on justification).

60. *Id.* at 116.

and killed a career criminal who had repeatedly victimized him in the past.[61] The shooter was charged and convicted of manslaughter in a trial in which the jury heard no instruction on justification.[62] Granting habeas review, the Second Circuit explored the state court's findings with respect to the petitioner's perceptions and beliefs at the time of the shooting, as well as his duty to retreat under the New York penal code.[63]

The facts of *Davis* describe a tragic and violent relationship between the defendant and the man he shot, a neighborhood bully[64] known as "Bubblegum."[65] According to the trial record, Bubblegum was "a six foot tall, 435-pound felon [who] had robbed, raped, and beaten . . . people," including Davis.[66] Davis made a habit of avoiding Bubblegum, and had already ducked him once on the day of the shooting.[67] Seeing his tormentor was not without effect, however. Out of fear of a possible encounter with Bubblegum, Davis obtained a handgun.[68] On their next encounter, which occurred later the same day on a street they both frequented, Davis was armed.[69] When Bubblegum approached Davis and reached toward his waistband, Davis shot and killed him, believing that Bubblegum was carrying a gun and intended to shoot him.[70] "Stricken with panic and hoping to beat [Bubblegum] to the draw, Davis ran . . . behind Bubblegum and shot him several times in the back."[71] Davis's perceptions turned out to be not entirely correct—Bubblegum was armed not with a gun, as Davis believed, but with a carpet knife.[72]

The Appellate Division of New York had found that the trial court properly refused to charge the jury on self defense because Davis "offered no convincing reason why he did not retreat from the scene at the time of the actual shooting"[73] and because "there [was] no objective view of the evidence under which the defendant could have had a reasonable belief that there was an imminent danger."[74] The state court found that the duty to retreat arose when Davis first saw

61. *Id.*
62. *Id.*
63. *See id.* at 121 n.3 (summarizing analysis of New York Appellate Division as focusing on issues of reasonable belief and duty to retreat).
64. *See id.* at 117. The Court noted that the victim had a reputation for violence and that Davis knew of this reputation. *Id.*
65. *Id.* at 116. Bubblegum's real name was Eddie Ray Leonard, but the Second Circuit consistently referred to him by his nickname.
66. *Id.* at 129.
67. *Id.* at 119.
68. *Id.*
69. *Id.*
70. *Id.* at 120.
71. *Id.* (internal quotations omitted).
72. *Id.*
73. *Id.* at 130 (citing People v. Davis, 648 N.Y.S.2d 79, 80 (App. Div. 1996)).
74. *Id.* at 131 n.7.

Bubblegum earlier that day,[75] and that the fact that Davis had not actually seen a gun was damning.[76] The court explained:

> Essentially, the trial judge's view was that, once Davis had seen Bubblegum on Amsterdam Avenue, knowing of Bubblegum's past violence and his threat of future violence, he could not return with a gun to Amsterdam Avenue where Bubblegum was without violating the duty to retreat specified [under New York law]. Having failed to retreat when he had the opportunity, Davis was not entitled to raise the defense of justification.[77]

Without the benefit of the self-defense charge that the defense was counting on,[78] Davis was convicted of manslaughter.[79]

Davis claimed that the failure to charge the jury on justification amounted to a constitutional violation of due process.[80] In analyzing whether a constitutional violation had taken place, the Second Circuit had to determine whether the justification charge was required by New York law.[81] The Second Circuit noted, "if the record includes evidence which, viewed in the light most favorable to the defendant and drawing all reasonably permissible inferences in his favor, satisfies the essential elements of the defense of justification, the charge must be given."[82]

The court determined that a justification charge would be required if the defendant had a reasonable belief that another person was using or was about to use deadly physical force against him.[83] The defendant would have a duty to retreat, however, if he knew he could "retreat with complete safety" from the imminent threat.[84] The court then reviewed the facts to see if Davis had a basis for such a reasonable belief about the imminence of a deadly threat and whether he has an opportunity to retreat which he neglected.[85]

The Second Circuit found that Davis had good reason to believe that Bubblegum was armed and coming to kill him.[86] On the question of whether the perceived threat was imminent, the court observed that, at the time of the shooting, "[i]f Davis's reasonable belief that

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75. *Id.*
76. *See id.* at 130.
77. *Id.* at 120.
78. *Id.* ("Defense counsel protested that he had prepared his summation to rely on a justification defense and that the court had never previously indicated that it would not charge on the defense of justification.").
79. *Id.*
80. *Id.* at 122.
81. *Id.* at 124.
82. *Id.* at 125.
83. *Id.*
84. *Id.* at 126.
85. *Id.*
86. *See id.* at 130 ("On all this evidence [of Davis's knowledge of Bubblegum], we think it was undisputably reasonable for Davis to believe that within a second, Bubblegum's gun would once again be pointing at him, and he would be dead.").

Bubblegum had a gun had been correct, he had one or two seconds left to live."[87] The court noted that, under New York law, once the belief is established as reasonable, it does not have to be correct.[88] Having found that Davis's belief was reasonable under the circumstances, the court judged him as if he had been correct in his mistaken belief that Bubblegum had a gun and meant to shoot him.[89] The court seemed to take no special notice of the fact that Davis shot Bubblegum in the back.[90] Because force was justified, the particular manner in which it was applied (i.e. the trajectory of the bullets) did not preclude a justification defense.[91]

Given the nature of the perceived threat (an assailant armed with a handgun), the court found Davis under no legal obligation to retreat.[92] The Second Circuit determined that the duty to retreat arose only when the threat was imminent and when the retreat could be made in "complete safety."[93] The court reasoned that because "Davis could not have fled without offering his back as an easy target," he was under no duty to retreat.[94] The court explained:

> The jury could have found that, when Davis had the opportunity to retreat from the scene in safety, he was not yet threatened with imminent use of deadly force. But when the time came that he reasonably believed Bubblegum was about to shoot him, it was no longer possible for him to retreat in safety.[95]

As a practical matter, *Davis* stands for the proposition that the duty to retreat will rarely arise when the defendant reasonably perceives a threat, as the duty depends on both the imminence of the threat and the condition that the defendant could *knowingly escape in complete safety*.[96] Where firearms are present (or even believed to be present, as in *Davis*), or a disparity in size, strength, and speed exists, it is hard to conceive of circumstances where a defendant could *know* that

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87. *Id.*

88. *Id.* (citing People v. Desmond, 460 N.Y.S.2d 619, 620 (App. Div. 1983) (finding that the "question is not whether the defendant was 'in actual peril of his life,' but whether 'he reasonably believed he was in such peril'").

89. *Id.* (crediting Davis's testimony that he did not flee because he was afraid Bubblegum would shoot him in the back).

90. *See id.* at 120.

91. Rounds striking the side and back are often the result of subject body movement. *See* Bill Lewinski, *Why Is the Suspect Shot in the Back?*, Police Marksman, Nov.-Dec. 2000, at 20. Here, however, the testimony was clear that the defendant ran behind his intended target before opening fire. *See Davis*, 270 F.3d at 120. Apparently, the court found this flanking maneuver a reasonable tactic once the defendant established the necessity to use deadly force.

92. *Davis*, 270 F.3d at 130.

93. *Id.* (citing N.Y. Penal Law § 35.15(2)(a) (McKinney 1998)).

94. *Id.*

95. *Id.*

96. *Id.*; N.Y. Penal Law § 35.15 ("[T]he actor may not use deadly physical force if he knows that he can with complete safety as to himself and others avoid the necessity [of using deadly force] by retreating.").

escape was a safe alternative to an effective counter-strike. In *Davis*, the Second Circuit ultimately concluded that, given the facts in the record, Davis was entitled to a jury instruction on justification and that the denial of the instruction did amount to a denial of due process.[97]

Davis is a valuable case for the purposes of the present discussion because it addresses several critical concepts in use-of-force litigation. First, the case provides a concrete example of facts and circumstances in an actual use-of-force incident. Second, it emphasizes the flexible but correspondingly uncertain application of the "reasonable person" standard, considering that several state and federal courts had affirmed the trial court's analysis before the Second Circuit reversed.[98] Third, the case provides a good example of the blending of statutory interpretation and case law analysis that will be inevitable in use-of-force litigation. Finally, *Davis* offers insight into the last chance, federal remedy of habeas relief for a wrongful conviction. While the specific statutes and case law will of course vary by jurisdiction, *Davis* provides a practical context for the the concepts of perception, belief, reasonableness, and imminence that will be analyzed in Parts II and III of this Note.

C. *Special Concerns in Police Use-of-Force Cases*

A use of force against a person is generally considered unlawful if it is unreasonable. When the police use force against a person, such as in the detention or arrest of a suspect,[99] additional issues arise.[100] Excessive force, the most common form of police misconduct,[101] may be prosecuted as a crime or, more commonly, may be actionable as a civil wrong.[102] For this reason, courts may conduct several inquiries

97. *See Davis*, 270 F.3d at 132 ("We are confident that this error had such enormous practical importance for Davis's conviction on the homicide charge that it must be considered a violation of due process.").

98. *Id.* at 121-22 (reviewing procedural history of the case, including conviction of defendant at state trial level, denial of appeal by New York Court of Appeals, denial of habeas petition on the merits by federal magistrate and federal district court in the Southern District of New York).

99. *See* Graham v. Connor, 490 U.S. 386, 388 (1989) (holding that "[excessive force] claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard"); *see also* Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding that the use of deadly force against a fleeing felon is unlawful unless the suspect poses an imminent danger to the officer or another).

100. *See* J. Michael McGuinness, *Shootings by Police Officers are Analyzed Under Standards Based on Objective Reasonableness*, N.Y. St. B.J., Sept. 2000, at 17 [hereinafter McGuinness, *Shootings*] ("Because of the unique law enforcement context, a special set of rules has emerged that is substantially different from ordinary tort and criminal law principles.").

101. *See id.* at 17 & n.5 (citing Gillespie et al., Police Use of Force (1998)).

102. *See* Samuel D. Faulkner, Ohio Peace Officer Training Commission, Use of Force: Decision Making and Legal Precedence 8 ("[O]fficers found to use excessive force either sadistically, frivolously, or while not on duty are subject to criminal

unique to police use-of-force cases. This part will address some of these inquiries, including: (1) protections for arrestees under the Fourth Amendment and federal statutes; (2) special protections for police officers, such as qualified immunity; and (3) the application of criminal and civil statutes.

1. Application of the Objective Reasonableness Standard

In addition to the issues of imminence and reasonable perception of danger discussed earlier, police use-of-force cases may also involve an inquiry into the severity of the suspected crime for which a person is being apprehended, and whether the suspect is resisting or attempting to resist arrest.[103] While police use-of-force incidents can involve complex webs of overlapping charges[104] and jurisdictions,[105] "[t]he common thread that runs throughout these liability theories is the *objective reasonableness standard.*"[106] The objective standard looks not at what was in the mind of the particular officer, but whether the officer's conduct reflected what a hypothetical reasonable officer would have done under the same circumstances.[107]

One of the paramount legal vehicles for vindicating the rights of victims of police abuse is an action under 42 U.S.C. § 1983.[108] The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

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sanctions." (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973))). Faulkner suggests that civil remedies are more common than criminal sanctions against officers because there are three formidable obstacles to criminal prosecution of police officers. *Id.* "First, suits are screened by a prosecutor with whom the credibility of the plaintiff pales in comparison with that of the officer. Second, . . . there is a reluctance of witnesses of fellow officers to come forth due to fear of reprisals. And finally, . . . the public is generally unwilling to punish the police with penalties normally reserved for criminals." *Id.*; *see also id.* at 9 (addressing prevalence of civil suits against police departments).

103. McGuinness, *Shootings*, *supra* note 100, at 17 & n.10 (citing Lennon v. Miller, 66 F.3d 416, 420 (2d Cir. 1995)).

104. *See id.* at 20 n.25 ("Virtually every conceivable legal theory and prospective legal cause of action available in tort, civil rights and constitutional law is readily applicable to law enforcement officers in their daily duties." (citing Avery et al., Police Misconduct: Law and Litigation (3d ed. 1999))).

105. Federal civil rights charges may be brought against police officers subsequent to or concurrent with state prosecutions. *See, e.g.*, Powell v. Superior Court, 283 Cal.Rptr. 777, 779 (Ct. App. 1991) (discussing state charges against police officers involved in Rodney King incident); Koon v. United States, 518 U.S. 81, 89 (1996) (addressing the procedural history of the federal prosecution arising from the Rodney King incident).

106. McGuinness, *Shootings*, *supra* note 100, at 18 (emphasis added).

107. See *supra* Part I.B.1 (explaining the difference between objective and subjective inquiries).

108. 42 U.S.C. § 1983 (2001).

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .[109]

When police officers, acting "under color" of law, wrongfully detain or otherwise injure people, § 1983 can provide relief. Given the generality of the statute, however, the analysis by which courts determine the violation has evolved considerably through case law.

In *Graham v. Connor*, the Supreme Court held that § 1983 claims for excessive force are "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard."[110] *Graham* concerned an incident where a police officer detained a diabetic who had been behaving suspiciously in and around a convenience store.[111] The diabetic's pleas for sugar or juice went unheeded by the officers, who believed he was drunk.[112] During the investigative stop, the suspect sustained numerous physical injuries, some of which resulted from being pushed face down onto the hood of a car.[113] After detaining Graham, police officers released him, lacking any probable cause to arrest.[114]

In analyzing the excessive force claim in *Graham*, the Court rejected a "generic standard"[115] of reasonableness for claims brought under § 1983.[116] Rather, the Court extended the holding in *Tennessee v. Garner*,[117] the seminal case on the use of *deadly* force by police, to cases where where police used non-deadly force.[118] *Garner* held that the apprehension of a suspect by the use of deadly force is a seizure properly analyzed under the Fourth Amendment's reasonableness test.[119] In examining the reasonableness of such a use of force, the Court evaluated the officer's actions with a balancing test, weighing the "'nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[120] In *Graham*, recognizing that the reasonableness analysis is "not capable of precise definition,"[121] the Court explained that a "proper application requires careful attention to the facts and

109. *Id.*
110. Graham v. Connor, 490 U.S. 386, 388 (1989).
111. *Id.* at 388-90.
112. *See id.* at 389 (noting that one officer remarked, "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk").
113. *See id.* at 389-90 ("Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder . . . .").
114. *Id.* at 389.
115. *Id.* at 393.
116. *Id.* at 393-94.
117. 471 U.S. 1 (1985).
118. *Graham*, 490 U.S. at 395.
119. *Garner*, 471 U.S. at 7.
120. *Graham*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 8).
121. *Id.* at 396 (internal quotations omitted).

circumstances of each particular case."[122] The Court rejected the notion that the officer's personal motivations were dispositive, instead employing an objective analysis.[123] The inquiry turned on whether the officer's actions were objectively reasonable.[124] Consequently, under *Graham*, police conduct in all use-of-force incidents is analyzed under a balancing test that is objective, yet flexible enough to take into account the wide variety of factors and circumstances under which such incidents arise.[125]

2. Qualified Immunity

The application of an objective inquiry into reasonableness is a common legal principle in use-of-force cases.[126] Police incidents, however, involve additional legal claims and defenses which set them apart from civilian self-defense cases.[127] While police officers are subject to federal claims like a § 1983 action, they are also entitled to increased protections from such liability. Officers, as government officials, have the opportunity to defeat claims before trial by invoking qualified immunity, a defense that deserves attention because it also incorporates a reasonableness analysis.[128] Unlike the defense of justification, "the privilege [of invoking qualified immunity] is an *immunity from suit* rather than a mere defense to liability."[129] While a court considers the facts in the light most favorable to the plaintiff in a qualified immunity analysis,[130] "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'"[131]

Qualified immunity protects individual officers from liability in performing discretionary functions "unless such conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known."[132] At the threshold, the

122. *Id.* (citing *Garner*, 471 U.S. at 8-9) (noting that "the question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure'").

123. *Id.* at 397 ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." (citing Scott v. United States, 436 U.S. 128, 138 (1978))).

124. *Id.*

125. *See id.*

126. McGuinness, *Shootings*, *supra* note 100, at 17.

127. *Id.*

128. *See* Saucier v. Katz, 533 U.S. 194, 200 (2001) ("Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985))).

129. *Saucier*, 533 U.S. at 200-01; *see also* Wyche v. City of Franklinton, 837 F. Supp. 137, 141 (E.D.N.C. 1993) ("Qualified immunity is an affirmative defense available to governmental officials which shields them from personal liability in § 1983 actions." (citing Anderson v. Creighton, 483 U.S. 635 (1987))).

130. *Saucier*, 533 U.S. at 201.

131. *Id.* at 202 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

132. Jackson v. City of Bremerton, 268 F.3d 646, 650-51 (9th Cir. 2001) (citing *Anderson*, 483 U.S. at 640).

plaintiff must demonstrate that the officer violated a constitutional right of the plaintiff.[133] If the court finds that a violation occurred, "the second inquiry is whether the officer could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right."[134] If the officer's mistake was reasonable, the officer is not liable.[135]

In examining the officer's conduct, the court judges "from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight."[136] Hence, the court employs an objective analysis rather than a subjective consideration of the particular officer's intent. Although this delicate inquiry is often considered to be a question of fact for the jury, the issue may be decided as a matter of law if, "in resolving all factual disputes in favor of the plaintiff, the officer's force was 'objectively reasonable.'"[137]

It is important to emphasize that the perception of danger, not the actual existence of a threat, is the critical issue in determining whether an officer is entitled to the protection of qualified immunity.[138] The reasonableness analysis allows for a balanced consideration of the factors affecting the officer on the scene. The Supreme Court has recognized that the chaotic circumstances under which use-of-force decisions are made are particularly challenging and should be considered in any inquiry into the reasonableness of the officer's conduct.[139] While the test is objective on its face, it still takes into account the uniquely difficult perspective of the actor and the variables inevitably surrounding the use-of-force incident.[140]

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133. A qualified immunity analysis is conducted in a light most favorable to the party asserting the violation. *Id.* The inquiry begins by asking whether the officer's conduct violated a constitutional right. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20-22 (1968)).

137. *Id.* at n.1 (citing Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994)).

138. *See* Davis v. Freels, 583 F.2d 337, 341 (7th Cir. 1978) ("[I]t is not necessary that the danger which gave rise to the belief actually existed; it is sufficient that the person resorting to self-defense at the time involved reasonably believed in the existence of such a danger, and such reasonable belief is sufficient even where it is mistaken." (internal citations omitted)).

139. Graham v. Connor, 490 U.S. 386, 396-97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

140. In reviewing each case, the court considers: "(1) the severity of the crime in question; (2) the *apparent threat* posed by the suspect; (3) whether the suspect was trying to resist or flee; and (4) whether the situation was judged from the perspective of a *reasonable officer* coping with a tense, fast evolving situation." Faulkner, *supra* note 102, at 14.

3. Apparent Danger Distinguished from Actual Danger

Because a police officer's actions based on a reasonable but mistaken perception about the danger of a situation can cause serious injury to the person being subdued,[141] the question of what constitutes objectively reasonable apparent danger, as opposed to actual danger, is central to understanding how to litigate successfully police excessive-force cases.[142] The "tense, uncertain, and rapidly evolving"[143] circumstances surrounding use-of-force incidents routinely give rise to conduct that is readily questioned in hindsight.[144] In developing a plausible justification defense, then, it is critical to recognize the inherent disparity between the perspective of a detached third party, i.e., a juror, and a defendant who has had

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141. *See* Saucier v. Katz, 533 U.S. 194, 205 (2001) ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed."); *see also* Wyche v. City of Franklinton, 837 F. Supp. 137, 142-43 (E.D.N.C. 1993). In *Wyche*, a mentally disturbed man chased a police officer around a parking lot, screaming at the officer that he was going to kill him. *Id.* at 139. When the officer perceived that Wyche was three to five feet away and "reach[ing] behind him as he lunged forward," the officer fired two shots, killing the suspect. *Id.* at 140. Wyche turned out to be unarmed, and the officer was sued under § 1983. *Id.* at 139. In analyzing the reasonableness of the officer's conduct, the court rejected an affidavit by a criminal justice instructor that argued that "[a] reasonable law enforcement officer would have known that a person experiencing abnormal psychological behavior and who did not have a weapon in his possession would not present an imminent threat to his life which necessitated the use of deadly force." *Id.* at 142 (citations omitted). Instead, the court found that the officer's perception of apparent danger justified his conduct. *Id.* at 143.

142. Courts increasingly employ a "could have believed" standard in analyzing the reasonableness of an officer's conduct, including reliance on the concept of "apparent danger" as opposed to "actual danger." *See* J. Michael McGuinness, *Judging Split-Second Decisions*, Police, Jan. 2000, at 58.

143. *Graham*, 490 U.S. at 397.

144. One controversial incident offering a rare glimpse into the ugly shadows of violence was the video that turned into the series of cases that came to be known as the "Rodney King cases." *See* Powell v. Superior Court, 283 Cal.Rptr. 777 (Ct. App. 1991). Michael Stone, defense counsel for one of the four police officers involved in the incident, has argued that the videotape was misleading and that it was King's behavior that determined the conduct of the officers. Stone argues that, in light of King's behavior, the officers' use of force was not excessive, but gave the appearance of being so because it consisted of a regrettable but not unlawful series of ineffective blows.

> What we see on the video is the result of improperly applied force. Most of the baton blows had no power, were glancing blows, or missed completely.... What lay people see as a "beating," police force experts describe as a classic example of improperly executed use of force.... If the force was unreasonable, it was unreasonable because it wasn't enough to quickly immobilize King.

Michael P. Stone, Legal Affairs Council, Against All Odds: The Trials of Officer Laurence Powell (1995). Stone's defense was successful against the state charges, but two of the officers were ultimately convicted of federal civil rights violations. *See* Koon v. United States, 518 U.S. 81 (1996).

training or experiences that will inevitably and profoundly shape that person's perceptions.[145]

One of the most controversial police use-of-force cases to arise in recent years was the shooting of an unarmed immigrant, Amadou Diallo, by four members of the New York City Police Department's Street Crime Unit.[146] The shooting occurred when the officers attempted to stop and question Diallo because his behavior raised the officers' suspicion.[147] Diallo, who unfortunately matched the description of a serial rapist who had been victimizing the neighborhood, was standing in the dimly lit vestibule of his Bronx apartment building a little after midnight when the officers approached.[148] According to the officers, they displayed their badges and announced their identity as they approached Diallo on the steps of his building.[149] When Officers Carroll and McMellon were only a step or two away, pursuing Diallo into the small vestibule of the apartment building, Diallo reached into his pocket and withdrew a black wallet.[150] Officer Carroll, alarmed by Diallo's motion, shouted "Gun!" Officer McMellon took a step backwards, falling down the vestibule stairs.[151] Which of the four officers fired the first round is uncertain, but in the next few seconds they together fired a total of forty-one rounds, at least nineteen of which struck Diallo as he stood in the narrow hall.[152] With flashes of muzzle blast bouncing off the reflective paint of the door, and the officers' own rounds ricocheting back at them, the chaos that erupted in those few seconds left the officers bewildered, seemingly under attack, and the young immigrant dying on the steps of his home.[153]

According to the officers, while one officer ran to the fallen McMellon, screaming "Where are you hit?" Officer Carroll, the closest to Diallo, looked down with horror at the wallet in the hand of the mortally wounded figure.[154] Reaction to the incident by the public and the Bronx District Attorney's Office was swift and damning.[155]

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145. Additionally, prevalent dramatizations of law enforcement officers in film and television may detrimentally influence jurors' expectations of appropriate police conduct.

146. *See* Cathy Burke, *Cops Gun Down Unarmed Man—41 Bullets Fired at Bx. "Suspect"*, N.Y. Post, Feb. 5, 1999, at 4, 1999 WL 3719569; Rafael A. Olmeda & John Marzulli, *Cops Blast Unarmed Man Fusillade Kills Bx. Peddler in Mystery Confrontation*, N.Y. Daily News, Feb. 5, 1999, at 4, 1999 WL 3424413.

147. *See* Phil Messina, *Dissecting the Diallo Shooting: Four Seconds to Hell*, Law Enforcement Trainer, July-Aug. 2000, at 9.

148. *Id.* at 10.

149. *Id.* at 9.

150. *Id.*

151. McMellon had substantial bruising on his coccyx as a result of the fall. *Id.*

152. *Id.*; *see also* Burke, *supra* note 146.

153. Messina, *supra* note 147, at 9-10, 30.

154. *See id.* at 9-10.

155. *See* Statement of Robert Johnson, District Attorney, Bronx County (Mar. 31, 1999) (on file with the *Fordham Law Review*).

The officers were charged with second-degree murder and first-degree reckless endangerment[156] and demonstrations expressing outrage at the officers and the Police Department sprung up around the city.[157] Because there was no question that the shooting itself was an intentional act, the officer's only plausible defense was justification.

Some of the public reaction to the case was perhaps due to a divide between the perceptions of police officers and those of civilians.[158] Few in the public could understand how forty-one rounds could be fired mistakenly, in good faith.[159] To complicate matters, the event quickly took on tremendous political significance for various factions in the city of New York.[160]

The Diallo case generated so much attention in New York City that venue was moved upstate to Albany, where the defendants were ultimately acquitted at the conclusion of a jury trial.[161] In a post-verdict interview, jurors' comments suggested that the critical step in their factual analysis was understanding the perception and conduct of a reasonable police officer under the circumstances.[162] The jurors learned how to evaluate the officers' conduct through the testimony of an expert witness presented by the defense.[163]

Certain classes of defendants who have uncommon experience, training, or responsibility can evidently greatly benefit from the jury's edification. In other words, in police cases, the analysis is in effect not addressed in light of a "reasonable person" standard, but instead a "reasonable police officer" standard, because police officers can be expected to behave differently than the rest of the population.[164] As we shall see, police officers are not the only persons whose

156. *See* People v. Boss, 701 N.Y.S.2d 342, 343 (App. Div. 1999).

157. *See* Mike Claffey & Bill Hutchinson, *500 Mark Day of Diallo's Slay*, N.Y. Daily News, Feb. 5, 2001, at 2, 2001 WL 4676237.

158. *See* Andrew Brooks & Harriet Ryan, Court TV, *Behind the Badge with Your Hand on the Trigger: Our Reporters Try Out the NYPD's 'Crisis Simulator'* (stating reporters who underwent training simulator experience found disparity between situational judgment of police officers and civilians) (on file with the Fordham Law Review).

159. *See* Messina, *supra* note 147, at 10, 30-33, 46, 48 (addressing common questions and concerns surrounding the event, including the amount of elapsed time for the shooting to occur and the officers' actions during that time).

160. *See* Claffey & Hutchinson, *supra* note 157 (indicating mayoral candidate was booed off stage after defending "police officers in this city who are decent, caring people").

161. *See Nation's Eyes on Albany as 4 Cops Exonerated*, Times Union Albany, Dec. 31, 2000, at C1, 2000 WL 31450078.

162. *See* Bryan Robinson, Court TV, *Diallo Jurors Say They Had No Choice But to Acquit* (describing jurors' analysis of the officers' perceptions and conduct during the event that resulted in the shooting of Amadou Diallo) (on file with the *Fordham Law Review*).

163. *See* John Marzulli, *Diallo Case Expert to Get Cop Training Post*, N.Y. Daily News, Mar. 6, 2002, at 8, 2002 WL 3168624.

164. *See* Brooks & Ryan, *supra* note 158.

perceptions and decisions are especially influenced by their experiences.

D. *Special Concerns in Domestic Violence Cases*

Like the use of force by police, the use of force by victims of domestic violence poses controversial legal and social issues.[165] Gender norms, societal expectations, pragmatic interpretations of legal notions of imminence,[166] and alternatives to using force[167] all contribute to a highly complex area of use-of-force litigation.[168] Evidentiary issues concerning battered-woman syndrome,[169] the social context of domestic violence,[170] and the effect and relevance of post traumatic stress disorder[171] present significant challenges to determining reasonableness.

People v. Emick[172] illustrates some of the complexities, as well as the horror, of domestic violence litigations. In *Emick*, the defendant was charged with first-degree manslaughter for fatally shooting her abuser in the head while he slept.[173] At trial, Emick presented a justification defense, arguing that she reasonably feared that her abuser, Marshall Allison, planned to kill her when he awoke.[174] The evidence at trial showed that Allison had tortured Emick for years, subjecting her to beatings, burning, whipping, torture with various objects, and even an attempted hanging.[175] An expert testified that,

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165. *See* Beecher-Monas, *supra* note 31, at 89-90 (addressing failure of courts to recognize the impact of domestic violence in making evidentiary rulings).

166. *See id.* at 100.

167. *See id.* at 101-02 (arguing escape and safe retreat are frequently not available options because of the nature of the personal relationship between the parties). *But see* Todd v. State, No. 05-95-00994-CR, 1998 Tex. App. LEXIS 2419, at *7 (Tex. App. Apr. 24, 1998) (affirming conviction of voluntary manslaughter despite testimony by expert that, due to battered-woman syndrome, "she believed she was unable to escape").

168. *See* Beecher-Monas, *supra* note 31, at 100-02.

169. According to clinical psychologist Lenore Walker, the syndrome consists of three phases.

> The first is a tension building phase, followed by a violent incident where the batterer expresses uncontrollable rage, and a third phase where the batterer expresses profound regret and intentions to reform.... Learned helplessness, or a false perception that there is no escape, is characteristic of Walker's syndrome theory and typifies the first two stages.

Id. at 113-14 (citing Lenore Walker, The Battered Woman Syndrome 86, 96 (1984)).

170. *Id.* at 124-25. Beecher-Monas challenges the "bogus science" of battered-woman syndrome and argues that courts should address the special concerns of domestic violence victims by splitting the expert testimony into two component parts—social context and post-traumatic stress disorder—and discarding the "(invalid) syndrome." *Id.*

171. *See id.* at 124.

172. 481 N.Y.S.2d 552 (App. Div. 1984).

173. *Id.* at 553.

174. *Id.*

175. *Id.* at 557-58.

suffering from battered-woman syndrome, Emick likely perceived no escape from her terrible situation.[176]

The perception that an attempt to escape would be futile was especially significant because in New York, and some other jurisdictions, there is a statutorily imposed duty to retreat under certain circumstances.[177] In New York, the duty requires that an actor must not use deadly physical force if she can knowingly escape in complete safety.[178] At trial, Emick opposed any mention of a duty to retreat (and the prosecution agreed) because the statute indicates that the duty does not arise when the actor is in her home and not the initial aggressor.[179] Nevertheless, the judge insisted on including language in the jury instruction that suggested retreat was an issue for consideration.[180] The jury, confused by the instruction, repeatedly asked for clarification.[181]

While the duty to retreat should not have been a central element to the crime charged, the evidence at trial did address the issue of whether Emick had realistic alternatives to killing her abuser in his sleep.[182] Although Emick had friends and family in the vicinity who had tried to assist her in the past, her perception was that the help offered would not protect her from Allison.[183] She had good reason to believe so. Evidence at trial showed that Allison went to such extreme measures as gluing the door shut when he went out, to make sure that no one had gone in or out of the home in his absence.[184] Allison told Emick many times that if she left him, he would find her and kill her.[185] On the night of the shooting, before going to bed, Allison choked Emick and told her that he would kill her and her children when he awoke.[186]

According to testimony, Richard Meyers, a friend of the couple, had visited the residence on the night of the shooting and had spoken to Emick on several occasions about the abuse.[187] At trial, the jury heard testimony that suggested it was Meyers's belief that Emick would have to resort to killing Allison if she was ever to be free of him, even before Allison made the specific threats on the fateful

176. *Id.* at 559. Dr. Matilda Rice testified that in the final stages of battered-woman syndrome, "the wife eventually feels that she cannot escape her tormentor and that she will be tracked down." *Id.*

177. N.Y. Penal Law § 35.15(2)(a) (McKinney 1998).

178. *Id.*

179. *Emick*, 481 N.Y.S.2d at 560.

180. *Id.*

181. *Id.*

182. *Id.* at 554-55.

183. *Id.* at 554-58 (noting that offers of help by friend and a community assistance program proved ineffective).

184. *Id.* at 556-57.

185. *Id.* at 558.

186. *Id.* at 557-58.

187. *Id.* at 556-57.

evening.[188] The timing of Emick's decision to kill Allison was critical, because the ultimate question for the jury was whether Emick had "an honest and reasonable conviction and fear that she was about to suffer death or serious physical injury" at the time she made the decision to kill.[189]

Despite the sympathetic nature of the defendant, and the inevitable disgust the jury must have felt towards the decedent, Emick was convicted of first-degree manslaughter.[190] On appeal, Emick argued that the judge had improperly admitted testimony about Meyers' belief and had also erroneously instructed the jury with respect to her duty to retreat.[191] The Appellate Division reversed the lower court and remanded for a new trial.[192] The court found that testimony regarding Meyers's conversations with Emick could have improperly led the jury to impute Meyers's own belief to Emick, fatally undermining her claim that she did not formulate a plan to kill Allison until the morning of the shooting.[193] The court explained:

> Given the fact that defendant's defense of justification was based upon her claim that she feared for her life on the morning of the shooting, principally because of the death threat issued only a few hours earlier by the decedent, permitting the jury to hear that Meyers believed that... she would have to resort to killing the decedent was extremely prejudicial to the defendant's case.[194]

Although the court found this evidentiary issue sufficient to warrant reversal, they felt the retreat issue merited some discussion as well.[195] The court stated summarily that, because Emick was in her own home, there was no duty to retreat, and therefore the jury charge addressing the duty was improper.[196]

Emick is replete with troubling and complex issues that surround domestic violence. For example, what practical alternatives to counter-force existed and, if such alternatives did exist, when was the defendant legally obligated to exercise them? Should she have been forced to abandon her home in lieu of using force? The statute's exception to the duty to retreat seems to champion the rights of a resident not to be wrongfully driven out. Absent a duty to retreat, however, could there have been any other conclusion than the death or grave injury of one of the co-habitants? Even so, given the law of

188. *Id.* at 562.
189. *Id.* at 560.
190. *Id.*
191. *Id.* at 560-61.
192. *Id.* at 563.
193. *Id.* at 562.
194. *Id.*
195. *Id.* at 563.
196. *Id.*

justification's philosophical premises of social utility, was the factual outcome unjust?

While a thorough treatment of domestic violence issues is well beyond the scope of this Note, the factual circumstances of the incidents that result in charges raise the same questions as all use-of-force cases: Was the conduct reasonable under the circumstances? Because many of the factors that arise in domestic violence incidents are common to use-of-force cases in general, the factors addressed herein provide additional options for presenting a justification defense.

E. *Admissibility of Experts*

Consultants and expert witnesses can help the attorney and the jury better understand the circumstances of a use-of-force case. An expert's testimony regarding a defendant's likely state of mind, perceptions or physical capabilities can often give a much fuller picture as to what is reasonable. While an expert can be useful without ever taking the stand,[197] the legal standard for the admission of an expert witness demands some attention,[198] because lawyers will often want the expert to present evidence directly to the jury.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[199] the Supreme Court set forth the test for federal courts to apply in determining whether to admit an expert. Under *Daubert*, the court will consider whether a theory or technique can be tested,[200] whether it has been subjected to peer review and publication,[201] the known or potential rate of error,[202] and whether the science has been generally accepted.[203] The litigator should take care to select an expert with solid credentials, especially because there is a growing "trend toward increased scrutiny of experts' theories and conclusions."[204]

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197. *See* Cynthia H. Cwik, *Guarding the Gate: Expert Evidence Admissibility*, Litig., Summer 1999, at 7.

> Sometimes, you need to learn more about a technical area but you do not need an expert witness to testify in court. Under such circumstances, a consultant will fit the bill. A consultant is an expert who does not testify in court, is generally not subject to discovery, and does not need to be disclosed.

Id.

198. *Id.* ("[O]nce you have decided that you need an expert and have chosen one to testify, you must focus on the vital issue of how best to ensure that your expert's testimony will be admitted. The touchstone for your effort will be the *Daubert* decision.").

199. 509 U.S. 579 (1993); *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (extending *Daubert* standard to nonscientific evidence).

200. *Daubert*, 509 U.S. at 593.

201. *Id.*

202. *Id.* at 594.

203. *Id.*

204. Cwik, *supra* note 197, at 10.

In light of *Daubert* and the various state court interpretations and practices,[205] an expert will not be permitted to testify about novel theories. Consequently, while use-of-force instructors who have general knowledge of the dynamics of violent encounters may be very useful in developing case theories, they will not be permitted to testify unless their conclusions have a basis that can satisfy the court's scrutiny.[206] Any testimony expounding on human behavior in high-stress situations has to be based on scientific testimony that is "generally accepted."[207] For trial testimony, defendants will need to enlist the services of reputable specialists.

F. *Meeting the Challenge*

As we have seen, in the varying contexts of self defense, police use of force, and domestic violence, the decisive issue on which justification turns is essentially the same. To defend against a charge of unlawful violence, a defendant must establish[208] that the use of force was in response to a reasonable belief that unlawful harm was imminent, that the defendant could not feasibly exercise a safe alternative (or was under no legal obligation to do so), and that the amount of force used was reasonable under the circumstances.[209] In police cases, the officer need only show that he reasonably believed his conduct to be lawful and appropriate based on his perception of the totality of the circumstances.[210] Because the defense may only be as good as the jury instructions which frame it, a careful review of the jury instructions is essential.[211]

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205. *See, e.g.*, People v. Miller, 981 P.2d 654, 659 (Colo. App. 1998) ("When deciding whether to admit expert testimony, the trial court must consider... the sufficiency and extent of the foundational evidence upon which the expert witness' ultimate opinion is to be based...."); Clemente v. Blumenberg, 705 N.Y.S.2d 792, 799 (Sup. Ct. 1999) (noting that "the New York Court of Appeals has not embraced the *Daubert* standard of scientific reliability, but has retained the *Frye* general acceptance test. The *Frye* test of 'general acceptance' is one measured by the scientists of the relevant scientific community to which it belongs").

206. *See* Cwik, *supra* note 197, at 6; *see also* David L. Faigman et al., *Legal Standards for the Admissibility of Scientific Evidence, in* Modern Scientific Evidence: The Law and Science of Expert Testimony (2d ed. forthcoming).

207. *Daubert*, 509 U.S. at 594.

208. In New York, the defense of justification is a defense, not an affirmative defense so, once raised, the burden of disproving it rests with the prosecution. *See*, N.Y. Penal Law 25.00(1) (McKinney 1998); Davis v. Strack, 270 F.3d 111, 124 (2d Cir. 2001); *In re* Y.K., 663 N.E.2d 313 (N.Y. 1996). Some states, however, consider justification an affirmative defense which must be raised by the defendant. *See, e.g.*, State *ex. rel.* Romley v. Superior Court, 836 P.2d 445, 451 (Ariz. App. 1992) ("[S]elf-defense is a statutory affirmative defense in Arizona...."); People v. Miller, 981 P.2d at 658 (explaining elements of "affirmative defense of self-defense").

209. *See supra* notes 83-96 and accompanying text.

210. *See supra* notes 117-25 and accompanying text.

211. *See, e.g.*, People v. Emick, 481 N.Y.S.2d 552 (App. Div. 1984).

In each type of use-of-force case, the focus will be on a sequence of events and perceptions that ultimately bear on the reasonableness and lawfulness of the parties' conduct. Whether the analysis is subjective (looking at the perceptions and conduct of the actual defendant) or purely objective (from the perspective of a reasonable person under the circumstances), perception and action are the key elements to justification.[212] Given the powerful environmental and internal influences that affect both the mind and the body of participants in a deadly encounter, putting the jury in the shoes of a defendant or "reasonable person" under the circumstances may be very challenging, but not impossible. What the litigator needs is the ability to provide context to the events.

II. UNDERSTANDING HUMAN BEHAVIOR IN THE MIDST OF VIOLENCE: A SCIENTIFIC APPROACH

In trying to judge the behavior of a reasonable person under extreme circumstances, what evidence can a fact-finder rely on? Certainly, if the defendant chooses to testify, the jury may hear about some of the challenges to decision-making and performance that the defendant experienced. And attorneys may make mention of these concerns when addressing the jury.[213] But to obtain an objective, credible understanding of how a person under stress perceives and interacts with his or her environment, we need to look beyond the impressions of the parties and their respective counsel.

Two areas of research, each drawing on the other, provide crucial and invaluable insight into dimensions of perception and performance that may bear directly on a determination of what is reasonable behavior in a violent confrontation. This part of the Note draws on those two fields, psychology and the science of combat-survival training, to explain what happens to a person in a life-threatening situation.

The first section of this part provides some examples of documented cases of perceptual distortions.[214] Then this part looks at

212. For a thorough discussion of the complexities of applying a workable standard to self-defense cases, see generally Nourse, *supra* note 28. Readers who find the distinction between subjective and objective analyses troubling should take heart, for they are not alone. Scholars have recognized that there is an inherent tension between the supposedly objective notion of "a reasonable person under the circumstances" and the inconsistent treatment of these situations by the courts. *See id.* at 1236. In practice, the application of the doctrine is prone to misinterpretation, inconsistencies, and contradiction. *See id.* at 1237.

213. For example, in the Amadou Diallo case, Stephen Worth opened for defendant Edward McMellon by addressing issues of training, experience, and reasonable belief based on the circumstances. Worth told the jury the officers' decisions were based on "[r]eason, common sense, training and experience." Transcript of Proceedings at 8, People v. Boss (N.Y. Sup. Ct. 2000) (on file with the *Fordham Law Review*).

214. *See infra* Part II.A.1.

scientific research by psychologists as a means of explaining perceptual phenomena.[215] Next, this part looks at the way professional use-of-force instructors have applied the science to understanding the dynamics of gunfights and other high-stress, combative situations in efforts to prepare police officers for deadly force encounters.[216] This part also looks at how the stress response affects physical performance, and discusses how the changes in the body's overall functioning can dramatically affect human behavior in use-of-force scenarios.[217]

A. *Emotion, Perception, and Performance*

1. The Artwohl Study

Dr. Alexis Artwohl, a clinical psychologist who has treated combat veterans and police officers as well as victims of child abuse, domestic violence, accidents, and disasters, has recorded reports by persons who experienced high levels of stress in use-of-force scenarios.[218] Her work has been particularly well received by the use-of-force training community.[219] Artwhol has found that individuals involved in such incidents undergo profound changes.

> When fear explodes inside of you, your sympathetic nervous system instantly dumps a variety of natural drugs and hormones into your body to cause the high arousal state .... [Y]our body operates differently .... Besides such obvious emotional symptoms as anger and fear, this high arousal state causes other changes that can be put into three categories: physical, sensory/perceptual, and cognitive/behavioral.[220]

The changes Artwohl mentions result from the functioning of the autonomic nervous system.[221] By interviewing people who survived frightening, high-stress incidents, Dr. Artwhol documented reports of the following specific perceptual changes:

a. *Tunnel Vision*: Tunnel vision is the result of the loss of peripheral vision, due to changes in the way the eye transmits information to the brain during a crisis.[222] The "field of vision ...

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215. *See infra* Part II.A.2.
216. *See infra* Part II.A.3.
217. *See infra* Part II.B.
218. Artwohl & Christensen, *supra* note 3, at 263.
219. *See* Massad Ayoob, *Portland Study Proves Mental Phenomena Occur in Gunfights*, *at* http://www.maltese.net/gryphon/Gunfight%20Study.htm (last visited Nov. 6, 2001).
220. Artwohl & Christensen, *supra* note 3, at 38.
221. *Id.* at 33.
222. *Id.* at 39 (referring to effects of "natural drugs" on vision); *see also* Lawrence N. Blum, Force Under Pressure: How Cops Live and Why They Die 45 (2000) (explaining function of limbic system); Siddle, *supra* note 3, at 76-77 (discussing

narrow[s] to mere inches" and a person loses "depth perception and [the] ability to see what is behind the threat."[223]

b. *Hearing Distortions*: The most common hearing distortion is hearing loss,[224] sometimes referred to as "auditory exclusion."[225] Persons experiencing auditory exclusion may not be able to comprehend warning shouts, the sound of other people approaching, or other information[226] that could critically influence decision-making.[227]

c. *Time Distortion*: Events may seem to occur in slow motion or, conversely, extremely rapidly.[228] A person may even experience both phenomena in the same event.[229] This distortion is closely related to the loss in depth perception that results from tunnel vision, confusing the brain's ability to gauge distance and speed.[230]

How likely is it that a particular person experienced any or all of these perceptual distortions during an incident? A survey of seventy-two police officers who had been involved in critical incidents indicates that the phenomena occur with compelling regularity. Eighty-two percent had experienced tunnel vision.[231] Eighty-eight percent had experienced diminished sound.[232] Time distortion occurred as slow motion in sixty-three percent of those surveyed, and as fast motion in seventeen percent.[233]

2. Scientific Background: Why Do These Distortions Occur?

While the precise manner in which emotional states affect perceptual and cognitive brain functioning is a controversial and complex inquiry,[234] research indicates that emotional states do

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findings of sports optometrist Hal Breedlove).

223. Artwohl & Christensen, *supra* note 3, at 39.

224. *Id.* at 40.

225. Siddle, *supra* note 3, at 78.

226. *See id.*

227. See, for example, *People v. Krupinski*, the recent case in Detroit, Michigan where a police officer was charged with manslaughter for shooting a rake-wielding assailant who did not respond to verbal commands. The victim's mother repeatedly shouted at officers, trying to explain that her son was deaf and mute, during the time when the officers were engaged with the suspect. *See* John Springer, Court TV, *Was He Protecting a Fellow Officer?*, *at* http://courttv.com/trials/krupinski/080101_ctv.html (last visited Apr. 9, 2002).

228. Artwohl & Christensen, *supra* note 3, at 42.

229. *Id.*

230. *Id.* at 39.

231. *Id.* at 49.

232. *Id.*

233. *Id.* at 49-50.

234. *See* The Heart's Eye: Emotional Influences in Perception and Attention (Paula M. Niedenthal & Shinobu Kitayama eds., 1994) [hereinafter The Heart's Eye] (consisting of thirteen chapters by various reputable experts, each exploring and scrutinizing the methodology and depth of research on the manner in which emotional states influence perception, attention, and recall).

produce physiological changes in the way the brain processes information,[235] and that the process is generally beyond the individual's control.[236] Anxiety in particular, which can be reasonably associated with use-of-force decision-making, affects how the brain orients, prioritizes, and anticipates responses to perceived threats.[237]

Studies by psychologists show that anxiety produced by a perceived threat results in "attentional narrowing,"[238] characterized as "an adaptive adjustment that serves to limit the processing of less important sources of information and to promote focused, effective responding."[239] This adaptive adjustment, however, does not necessarily produce the best response when situations are complex[240] or "when attention focuses on some information sources at the expense of other relevant ones."[241]

Attentional narrowing may be particularly problematic for a police officer, who is expected to select an appropriate tool and level of force from an incremental and multi-layered ladder of options.[242] These options include mere presence, verbal commands, use of a deterrent spray, empty-hand physical control techniques, batons, electronic "stun guns," and deadly force, which is typically associated with firearms.[243] The officer is supposed to match the appropriate tool or level of force to the suspect's behavior.[244] While there is a tendency in training to equate a particular suspect's behavior with a specific level of force,[245] in reality a great deal of overlap exists, because

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235. *See* Douglas Derryberry & Don M. Tucker, *Motivating the Focus of Attention*, *in* The Heart's Eye, *supra* note 234, at 167, 188-89 (explaining physiological analysis for influences on direction and scope of attention).

236. Marcia K. Johnson & Carolyn Weisz, *Comments on Unconscious Processing: Finding Emotion in the Cognitive Stream*, *in* The Heart's Eye, *supra* note 234, at 145, 158 ("[E]motion may control our attention, even determine the product of earliest perceptual processing. Furthermore, the impact of emotion may be automatic, beyond control.").

237. Derryberry & Tucker, *supra* note 235, at 189 ("[A]nxiety facilitates anticipatory representations of potential dangers and alternative coping options, which are evaluated and used to set up a plan of action.").

238. *Id.*

239. *Id.*

240. *Id.* at 191 ("With stronger narrowing, an individual may fail to sample adequately the entire set of possible options, perhaps considering only a small subset. The individual may even focus on a single solution, carrying it out in an inflexible and preservative way.").

241. *Id.* at 190.

242. *See* Faulkner, *supra* note 102, at 19-20 (explaining typical options an officer is expected to employ in countering resistance).

243. *Id.*

244. *Id.*

245. *See id.* at 22 ("These factors rarely follow an exact pattern or order of progression. This is why it is somewhat of an injustice to label the resistance as a 'level'.").

deadly force can result from empty-hand techniques[246] and the suspect's behavior can change rapidly.

Attentional narrowing can also cause a person to fail to recognize important environmental information, such as the presence of non-participant bystanders. Heightened arousal states tend to amplify the central stimulus, focusing a person's limited perceptual faculties on a particular object or event.[247] Consequently, "visual attention may become overly focused on central targets at the expense of peripheral targets, and object perception may emphasize local rather than global aspects of form."[248] To invoke a common metaphor, the observer loses sight of the forest (the global form) and sees only a single tree (the local form). Stress brought on by participation in dangerous situations in particular "reduces the range of cue utilization, acting both on perception and other cognitive and conceptual skills."[249] It becomes more difficult for the observer to mentally process the connection between the "cue," such as the perception of the presence of a firearm in a crowd of people, and the available and appropriate responses. For example, the observer could lose sight of other, equally important cues, like the presence of an innocent bystander standing behind the threat. While the neurological processes that produce these effects are complex, the existence of these phenomena has been documented in participants of laboratory experiments and target groups,[250] including police officers, who have survived sudden, violent encounters.[251]

3. Perceptual Distortion in Use-of-Force Incidents

Bruce Siddle, a trainer and police use-of-force expert, has sought to explain the relationship between circumstances in use-of-force situations and the perceptual distortions documented by Dr. Artwohl and others. Siddle's research and methodology, developed to set realistic training goals for survival training, focuses specifically on the types of circumstances likely to be present in violent encounters.[252]

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246. *See, e.g.*, United States v. Livoti, 22 F. Supp. 2d 235 (S.D.N.Y. 1998) (finding officer caused death through application of choke hold).

247. *See* Shinobu Kitayama & Susan Howard, *Affective Regulation of Perception and Comprehension: Amplification and Semantic Priming*, *in* The Heart's Eye, *supra* note 234, at 41, 43-44 (citing J.A. Easterbrook, *The Effect of Emotion on Cue Utilization and the Organization of Behavior*, Psychol. Rev. 66, 183-201 (1959)).

248. Derryberry & Tucker, *supra* note 235, at 181.

249. *Id.* (citation omitted).

250. *Id.*

251. *See* Artwohl & Christensen, *supra* note 3, at 48-50 (providing results of survey of seventy-two police officers who had been involved in deadly force encounters).

252. *See* Siddle, *supra* note 3, at 7 ("This text is a culmination of eight years of research into educational psychology, neurobiology, motor learning sciences and thousands of hours in the classroom. . . . My goal is to unwrap some of the mysteries surrounding combat and survival performance, with the ultimate goal of enhancing the survival of today's warriors."); *see also* Bruce K. Siddle & Dave Grossman, *Effects*

Siddle's extensive research into the effects of stress delves into the fields of psychology, sports medicine, and optometry to help explain the causes of the phenomena.[253] Through the use of heart monitors and other data-recording devices, Siddle has documented elevations in heart rate and increased levels of adrenal hormones in individuals who perceive danger.[254] In response to a threat, the body prepares large muscles for immediate use at the expense of smaller muscles and systems.[255] Siddle's research supports the proposition that, under stress, attention is focused on the threat to the exclusion of information that does not seem relevant to immediate survival.[256]

One of the most dramatic effects of stress is the change it induces in the way a person takes in visual information. Dr. Hal Breedlove has worked with Siddle to help understand and explain the phenomenon of visual distortion.[257] Far from atypical, visual distortions and their effects on responsiveness are the norm in a high-stress incident, caused by physiological changes in the way the eye works. Breedlove and Siddle have described these changes in detail:

> [T]he eyes have difficulty focusing during survival stress.
>
> Focusing of the lens is a function of the sympathetic nervous system, which is responsible for activities associated with survival. The lens is normally held in a flattened, distance-viewing state by tension of the radial ligaments. Parasympathetic excitement contracts the ciliary muscle, which releases this tension, allowing the lens to become more convex.[258]

People under stress perceive their environment differently because the lens through which they view the world literally changes shape.[259] Additionally, the amount of available light and the distance to the object are important factors in determining the accuracy of visual perception.[260]

For litigation purposes, it is critical that the causes of perceptual distortion can be explained in credible, scientific principles, because the admission of expert testimony will be much more likely if the

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of Combat Stress on Performance, *at* http://members.home.net/alienhand/Survival_Stress_Reaction_Training.htm (last visited Nov. 6, 2001).

253. Siddle, *supra* note 3, at 7.

254. *Id.* at 47, 76-77.

255. *Id.* at 47.

256. *See id.* at 75.

257. *See* Bruce Siddle & Hal Breedlove, *How Stress Affects Vision and Shooting Stances*, Police Marksman, May-June 1995, at 30.

258. *Id.* at 30-31.

259. *Id.*

260. *See* Paul Michel, *A Study in the Determination of Lethal Versus Non Lethal Object Discrimination in Officer Involved Shootings*, FBI Law Enforcement Bulletin (addressing difficulty of distinguishing weapon from non-weapon object) (on file with the *Fordham Law Review*).

court can ascertain a reliable basis for the knowledge.[261] Further, because courts traditionally rely on notions of objectivity,[262] it may be more persuasive to show that perceptual distortions occur because of the human body's physiology, as opposed to one particular defendant's unique, and therefore arguably subjective, perspective.[263]

Siddle argues that perceptual narrowing can sometimes explain what appears to be negligent or reckless behaviors.[264] He offers the example of an officer who shoots at a suspect with apparent disregard for innocent bystanders because, due to the physiological stress response he has undergone, he simply does not see or hear them.[265]

B. *Performance Under Stress*

The defendant's perception, while important, is only half of the equation for analyzing a use-of-force incident. The other half is the act or acts that the defendant performs in response to the perception.[266] Even if the defendant establishes that he or she held a reasonable belief that force was justified, it is still possible that a jury will determine that the extent or level of force employed was improper.[267] Consequently, our discussion now turns to the related issue of performance under stress which, like perception, is dramatically affected by heart rate and related changes in the functioning of the nervous system.[268] Stress affects performance in use-of-force situations in at least three important ways: 1) Reaction time is increased; 2) the distance from an assailant necessary to remain safe is greater than expected and difficult to judge; and 3) motor-skill dexterity diminishes and may produce involuntary fist clenching.

1. Reaction Time

Reaction time affects the availability of responses that can reasonably be performed within a given time frame.[269] To have a realistic understanding of the amount of time a person has to make a

261. *See supra* Part I.E (addressing standards for admissibility of expert scientific evidence).

262. *See* Heller, *supra* note 2, at 8-9.

263. *See* Nourse, *supra* note 28, at 1240-42 (noting debate over validity of subjective versus objective standards).

264. Siddle, *supra* note 3, at 75.

265. *Id.* at 76-77.

266. *See, e.g.*, *In re* Y.K., 663 N.E.2d 313, 314 (N.Y. 1996) ("It is not enough that the defendant believed that the use of force was necessary under the circumstances; his reactions must be those of a reasonable person similarly confronted.").

267. For example, a person may use physical force in self-defense, but may not use deadly physical force unless special circumstances arise. *See supra* notes 28-34 and accompanying text.

268. *See* Siddle, *supra* note 3, at 45-60.

269. *See id.* at 67 (citing E. McGivern, Fast and Fancy Revolver Shooting (New Win Publishing, Inc. 1984) (1932)).

decision under stress—to shoot or not to shoot, for example—reaction time must be considered as a separate part of the total event time, because it occupies a period that will be spent merely recognizing the threat. Siddle defines reaction time as "a function which occurs between the sensory nervous system and the brain's ability to recognize and identify a proper response."[270] The more challenging the threat stimulus, the longer the reaction time will be.[271]

In a life-or-death situation, notwithstanding the showdowns of classic Hollywood Westerns, the individual who reacts to the other's movement generally loses the race to "draw," especially if an assailant produces a concealed weapon.[272] Additionally, studies focusing specifically on situations where a suspect is shot in the back show that the "lag time" between the shooter's decision to pull the trigger, the shot going off, and the subject's contemporaneous movement can produce results that appear indicative of unjustified shootings.[273] Because lag time between threat perception and response is an inevitable condition in violent confrontations, and because the subject can move independently, the precise placement of shots is impossible for the shooter to control.[274]

2. Rate of Travel and Imminence: At What Distance Does an Assailant Present an Imminent Threat?

Closely related to reaction time is the issue of an assailant's rate of travel—the amount of elapsed time it takes for a person to close distance.[275] The assailant's rate of travel becomes particularly important in analyzing at what distance it is reasonable to believe that a threat is imminent. A common misperception is that a significant distance represents a substantial amount of time and, therefore, a lack of imminence in the threat. Many readers (and jurors) might be surprised to learn that an individual standing thirty feet away could pose an imminent threat[276] in light of the Second Circuit's recent

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270. *Id.* at 62-63 (citing R. A. Schmidt, *Motor Learning & Performance; From Principles to Practice*, Human Kinetics (1991)).

271. Reaction time may be increased dramatically by the environmental stressors on the actor—as much as 400% in some instances. Siddle, *supra* note 3, at 76, 83.

272. *See* Raymond P. Rheingans, *Violator Movement Times vs. Officer Response Times in Armed Encounters*, PPCT Res. Rev., June 1998, at 2 (describing reaction-time experiments that show that an "officer who is unaware of a subject's weapon could be behind by .79 seconds or more if the subject suddenly drew his weapon").

273. *See* Mark Hansen, *Faster than a Speeding Bullet: Study Says Quick Turns by Suspects Can Account for Gunshot Wounds in Back*, A.B.A. J., Sept. 1997, at 38, 38.

274. *See* Lewinski, *supra* note 91, at 20.

275. The equation for determining the assailant's rate of travel is Rate equals Distance divided by Time.

276. For a thorough discussion of some of the complexities and inconsistencies in the law's treatment of the concept of imminence, see generally Nourse, *supra* note 28.

finding that "one or two seconds" from harm amounts to imminence.[277]

Frank Borelli, a police use-of-force researcher, has re-examined the accepted standard of twenty-one feet as a "safe distance" in light of experiments that consistently show a suspect's average rate-of-travel at approximately fourteen feet per second.[278] Considering reaction time, if an assailant charges from a distance of thirty feet, the defender will be less than two seconds from harm by the time he realizes that he or she is under attack. A combination of reaction time and rate-of-travel evidence could be persuasive in showing how a defendant reasonably perceived a threat of imminent harm from an assailant who was a considerable distance away, perhaps armed only with a contact weapon, such as a knife.[279]

3. Motor Skills

In his investigation of the effects of stress on performance, Siddle found a direct correlation between reaction time, elevation in heart rate, and loss in manual dexterity.

> When a [person] has the advantage of time, he can prepare and plan with clarity of mind. . . .
>
> In contrast, "lost time" in a survival encounter initiates a chain reaction of escalating stress. . . . Heart rates continue to increase as the [person] recognizes that loss of time is increasing. Finally, a survival stress response occurs . . . .[280]

The "survival stress response" includes changes in nervous system function and body chemistry that produce a diminution in fine motor skills,[281] such as shooting, turning a doorknob to escape, or even dialing "911" on a telephone.

The more stress a person experiences, the greater difficulty he or she will have performing complex tasks that might otherwise be considered desirable and appropriate responses to a perceived threat. A person will probably not be able to perform many tasks that require fine motor skills if his or her heart rate has risen significantly.[282] The

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277. Davis v. Strack, 270 F.3d 111, 130 (2d Cir. 2001).

278. *See* Frank Borelli, *21 Feet Is Way Too Close!*, Law Enforcement Trainer, July-Aug. 2001, at 12, 14 (challenging the notion that a twenty-one-foot distance between an officer and a suspect allows the officer sufficient time to react to an attack); *see also* Seth DuCharme, *Sharpening Skills in Edged Weapons Defense*, Law Enforcement Tech., Jan. 1996, at 20, 20-21 (addressing misconceptions about assailants' rate of travel).

279. *See, e.g.*, Jamie Stockwell, *Officers Kill Armed Suspect: Pr. George's Police Say Man Had Knife, Refused to Surrender*, Wash. Post, Oct. 5, 2001, at B7, 2001 WL 28362307.

280. Siddle, *supra* note 3, at 61.

281. *Id.* at 43-47.

282. *See id.* at 97 ("The research findings stipulate that only gross motor skills will

more complicated the task, the less "reasonable" it becomes to perform in a sudden, life-or-death confrontation, because the chance that it will be performed effectively diminishes.[283]

One final factor for consideration of the effects of stress on performance is the "fist reflex."[284] The fist reflex is the involuntary closing of the hand as part of the body's alarm reaction. While this reflex is instinctive, it is more likely to occur when it has become a conditioned response to threat stimuli.[285] The fist reflex could potentially result in an accidental shooting if an officer, pointing a gun at a suspect, is startled and the officer's hand reflexively and unintentionally closes into a fist, thereby depressing the trigger and discharging the weapon.

The fist reflex in the gun hand may also occur as a sympathetic nervous-system response to the activity in the empty hand.[286] For example, a person who grabs something with his or her empty hand may unintentionally send a signal to the hand holding the gun to close into the same position, which will often be a motion that discharges the gun. This kind of activity is likely to occur when a person is falling and reaches out to grab an object for balance, or is forced to grapple with a resistive adversary with a gun in his or her hand.[287]

Reaction time, an assailant's rate of travel, and the effect of stress on fine motor skills, including the fist reflex, all affect the reasonableness of responses to a perceived threat. A defendant's seemingly inappropriate responses may be the result of physical limitations[288] or reflexes[289] brought on by the stress of an encounter and may be, in fact, quite reasonable given the circumstances. For example, the level of accuracy one might reasonably expect from a shooter diminishes significantly once it is recognized that shooting is a fine motor skill that depends on eye-hand coordination.

Persons who display certain levels of technical skill under non-stressful conditions should not be expected to reproduce the same

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be able to withstand the affects of survival stress.").

283. These findings might be persuasive to explain, for example, why a defendant struck an assailant with a telephone (gross motor skill) without first trying to dial a number on it to call for help (fine motor skill).

284. *See* Phil Messina, *Ready When Your Gun Goes "Bang"?*, Am. Police Beat, Oct. 2000, at 35, 35 (stating that instinctive fist reflex "can be suppressed or enhanced through . . . conditioning").

285. George Demetriou, *To Punch or Not to Punch That is the Question!*, Law Enforcement Trainer, Mar.-Apr. 1994, at 46, 48 (explaining that involuntary discharge is more likely when officers had been trained to make fists in response to threat); Messina, *supra* note 284, at 35.

286. *See* Demetriou, *supra* note 285, at 48.

287. *See, e.g.*, Kevin Flynn, *Bronx Man Was Shot Up Close, Police Say*, N.Y. Times, Mar. 4, 2000, at B4, 2000 WL 16314043 (reporting unarmed drug suspect was shot during a struggle in a stairwell).

288. *See supra* notes 280-84 and accompanying text.

289. *See supra* notes 284-87 and accompanying text.

level of competence under extreme stress. Responses that rely on dexterity or substantial amounts of time (more than one second, in most circumstances) will rarely be reasonable in a critical incident because, in all likelihood, they simply will not be reliable under stress. In deadly force encounters, defendants may reject alternatives instinctively, but may not be able or willing to articulate the experience in such a way that it will be useful in developing a justification defense.[290] To best understand the encounter, the attorney may need to seek out the services of a use-of-force consultant or an expert witness. Part III looks at how the science discussed above can be, and has been, practically applied to use-of-force litigations, at all stages of case development.

III. APPLICATION OF THE SCIENCE

This part explains how, through the use of research, consultants, and expert witnesses, the science discussed in Part II can make a significant difference in litigation strategy and, ultimately, in the outcome of the case. First, this part considers the close relationship between the science discussed previously and the legal formulations for reasonableness.[291] Second, this part looks at the complementary but distinct roles of the consultant and the expert by providing insight gleaned from interviews with two prominent figures in the field of use-of-force research as it applies to litigation.[292] Third, this part addresses the application of the science to the types of cases discussed in Part I.[293] Finally, this part suggests that the role of science, whether accessed through available research, a consultant, or an expert witness, has a critical but limited application. The role of the research or expert testimony is limited in that it can never replace the responsibility for factual analysis that resides solely with the fact-finder. By providing a context for the fact-finder's analysis, however, the use of such scientific information may be dispositive if the ultimate issue is the credibility of the justification defense.[294]

A. *Providing a Context for Reasonableness*

Dr. Artwohl's findings regarding perceptual distortions[295] are remarkable in light of the critical importance of the law's emphasis on

290. Psychological barriers and limitations arise not only during a deadly force encounter, but afterwards as well. For a fascinating discussion of the innate human resistance to killing and accurately relating the experience of killing to others, see Dave Grossman, On Killing: The Psychological Cost of Learning to Kill in War and Society (1995).

291. *See infra* Part III.A.

292. *See infra* Part III.B.

293. *See infra* Part III.C.

294. *See infra* Part III.D.

295. *See supra* Part II.A.

perception as it relates to justification.[296] When the law contemplates a reasonable person, does it contemplate that the person is likely to experience such dramatically distorted perceptions of the world around her? Is it fair to ignore these elements in judging an individual's conduct? In *Davis*,[297] for example, how much litigation could have been avoided if the defense had been able to show at trial the perceptual and performance factors that influenced the defendant's decision to shoot Bubblegum? Arguably, omission of these elements provides the fact-finder with an incomplete context in which to make an accurate determination. The court will be reluctant to admit assertions of the existence of these phenomena, however, without substantial science to back them up.[298] As always, the court must weigh the probative value of the evidence against the potential for prejudice or confusion.[299]

Recalling the facts of *Emick*,[300] for example, scientific evidence certainly could have contributed to the jury's understanding of the defendant's alternatives. Most intriguingly, arguments could have been made regarding the practical circumstances and tactical considerations under which the shooting took place. Would Emick have had a stronger case if she woke her abuser first, instigating an inevitable attack that would place her in greater danger? The research on subject performance and behavior,[301] along with the history of the defendant's victimization,[302] suggest that waking the larger, stronger abuser would have been risky at best, and contrary to Emick's goal of protecting her life and the lives of her children.

Placing the parties outside their home, and thereby removing the resident exception to the duty to retreat,[303] raises even more provocative issues. The court noted that Emick was incapable of making her escape by car, because she did not know how to drive.[304] If she was under a duty to retreat, could she have done so in "complete safety"?[305] Should she have tried? What would a reasonable person do under the circumstances? The defense relied in part on testimony regarding the effects of battered-woman syndrome, but perhaps other evidence, such as that pertaining to reaction time or

296. *See supra* Part I.A-B.
297. Davis v. Strack, 270 F.3d 111 (2d Cir. 2001); *see supra* notes 59-98 and accompanying text.
298. *See supra* Part I.E (addressing standards for admissibility of scientific evidence).
299. Fed. R. Evid. 403.
300. People v. Emick, 481 N.Y.S.2d 552 (App. Div. 1984); *see supra* notes 172-97 and accompanying text.
301. *See supra* Part II.B.
302. *Emick*, 481 N.Y.S.2d at 553.
303. N.Y. Penal Law § 35.15(2)(a)(i) (McKinney 1998).
304. *Emick*, 481 N.Y.S.2d at 558.
305. N.Y. Penal Law § 35.15(2)(a); *see Emick*, 481 N.Y.S.2d at 558.

rate of travel, could have offered more objective proof of justification than the testimony offered regarding battered-woman syndrome.[306]

While courts have been receptive to expert testimony regarding battered-woman syndrome,[307] one commentator has suggested that this trial tactic suffers from a perception that it demeans the client and raises skepticism among the jurors.[308] Because the nature of the syndrome is controversial,[309] jurors who doubt the empirical basis of the science will be reluctant to find that the syndrome justifies a woman's distorted yet perhaps reasonable perceptions of danger.[310] In short, introducing expert testimony concerning battered-woman syndrome can be an effective tactic, but it is evidently a double-edged sword.[311]

Litigators may wish to consider expert testimony regarding more universal perceptual factors. Doing so would transcend gender stereotypes and place the defendant more squarely in the territory of objective reasonableness. Juries arguably find such testimony more accessible and persuasive than testimony about a syndrome that they may be predisposed to discount.[312]

Similarly, police cases frequently present issues that are challenging for defense attorneys to address. Research into the dynamics of confrontations, however, can provide compelling approaches. Again, scientific evidence about reaction time and body mechanics can help to explain or mitigate what often seem like willful acts of unjustified violence. In a mistaken-identity shooting of a plain-clothes New York City police officer by other officers, a witness reported that the first two shots fired struck the plain-clothes officer in the chest, but

306. Evidence could have suggested, for example, that Emick could not make her escape without the risk of waking Allison and that, once awakened, Allison would be reasonably likely to pursue Emick. Empirical evidence as common as high school track times could show that, on average, men run faster than women and that a reasonable woman does not "know" that she can successfully outrun a man intent on catching and killing her.

307. Beecher-Monas, *supra* note 31, at 112 ("At least twelve states have statutes mandating admissibility of expert testimony on battering in self-defense cases. Thirty-nine states permit expert testimony on battering . . . ." (citing Boykins v. State, 995 P.2d 474, 476 (Nev. 2000))).

308. *Id.* at 114 ("[F]eminists argue that it creates an image of flawed, deranged women overreacting to their distorted perceptions of reality.").

309. *See Emick*, 481 N.Y.S.2d at 559 (noting psychiatrist who testified about battered-woman syndrome acknowledged that it "had not been completely accepted in psychiatric circles").

310. *See* Beecher-Monas, *supra* note 31, at 115 ("[T]here is an even more fundamental flaw with battered woman's syndrome testimony: it lacks empirical support . . . .").

311. *Id.* at 114 ("Battered woman syndrome testimony has been attacked on several fronts.").

312. *Id.* at 83 n.6 ("[J]uries overwhelmingly convict even where battered woman syndrome testimony is admitted . . . ." (citing Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 Wis. Women's L.J. 75, 86-87 (1996))).

subsequent rounds struck the man as he fell.[313] While the incident appears to be a clear case of police misconduct, there are alternative explanations that would be of great value to the advocate put in the position of defending the officer who fired the rounds.

One possible explanation for the officer's continued and seemingly unnecessary shooting is that, because of reaction time, his responses were always a fraction of a second behind the suspect's actions, long enough for the suspect to turn or fall before the officer's brain could send the message to cease firing.[314] Without taking into account reaction time, juries may hold the defendant to an unrealistic and, therefore, *unreasonable* standard, especially when reaction time is considered in combination with rate of travel and body movement.[315]

B. *Use of Scientific Research: Developing a Game Plan Based on a Realistic Understanding of Events*

Because lawyers and defendants in use-of-force cases cannot be expected to have personal knowledge of the dynamics of violent encounters, they may wish to enlist consultants, use-of-force experts, optometrists, psychologists, and other specialists at the very earliest stages of case preparation to provide information that may be useful in developing legal arguments and defenses. Expert consultation can also indicate when a client's version of events is improbable.[316]

Phil Messina, a researcher and trainer who specializes in defensive tactics, served as a consultant to the defense team in the New York case *People v. Boss*,[317] concerning the Amadou Diallo incident discussed in Part I.[318] Messina's knowledge of suspect behavior, body motion, and perceptual distortions, as well as hundreds of experiments and recreations he conducted at his facility, provided the defense team with compelling avenues for formulating a justification defense that ultimately proved successful.[319]

Having filled the roles of both consultant and expert on behalf of prosecutors, plaintiffs, and defendants, Messina draws on substantial

313. *See N.Y. Officers, Commuter Wounded in Subway Gunfire*, Wash. Post, Aug. 24, 1994, at A9.

314. *See supra* notes 268-76 and accompanying text.

315. *See supra* Part II.B.

316. *See* James J. Fyfe, *Police Expert Witness*, 511 PLI/Lit 307, 309, 315 (1994) (reprinted from 21 Crim. L. Bull. 515 (1985)). Fyfe, who testified for the defense in the Amadou Diallo trial of four police officers, has recently been appointed head of training for the New York City Police Department. *See* Marzulli, *supra* note 163, at 8.

317. 701 N.Y.S.2d 342 (App. Div. 1999).

318. Recall that culpability in the Diallo case hinged on whether it was reasonable for four officers to fire a total of forty-one shots at a suspect in a darkened vestibule who had reached into his pocket and withdrawn a black wallet. *See supra* notes 146-64 and accompanying text.

319. For a discussion of some of the issues Messina addressed in assisting the defense, see Messina, *supra* note 147, at 8, 9.

and diverse experience.[320] In addressing the question of how consultants and experts can be most effectively utilized, Messina points out that it is important to distinguish between the function of the consultant and the function of the expert.[321] One common tactic among litigators is to develop a theory of the case and then search for an expert to back it up.[322] Messina finds this approach problematic, because the expert may be known for a particular view and the jury may see the defendant as searching for a convenient, prefabricated excuse instead of a legitimate explanation.[323]

Instead, Messina suggests utilizing a consultant at the earliest stages of the case development, because the consultant will have a broader understanding of the factual issues involved.[324] Clients who likely suffered problematic perceptual distortions at the time the incident took place cannot be relied on to recreate accurately the full event for the attorney's benefit.[325] They simply cannot comprehend the complete picture.[326]

Once the attorney and the consultant have agreed on a plausible theory of the incident, then the consultant may assist in locating an expert or complementary team of experts to address the crucial areas.[327] Messina suggests that a number of factors can come into play

320. Messina's broad range of experience offers him a unique perspective on the various functions of consultants and experts. In addition to serving as the lead consultant for the criminal defendants in the Diallo case, Messina has assisted the Queens District Attorney's Office in the prosecution of a homicidal martial arts expert. For an example of Messina's testimony, see People v. Kempsey, No. 2174/92 (N.Y. Sup. Ct., Oct. 28, 1993) (transcript on file with the *Fordham Law Review*). Messina also assisted the plaintiff's attorney for the widow of a police officer in a suit against chemical deterrent spray manufacturers for negligent training and marketing practices. *See* letter from Jeffrey S. Merrick, Attorney, Williams & Troutwine, P.C., to Phil Messina (June 23, 1994) (concerning *Ward v. Zark Int'l & Luckey Police Prod.*, No. 9303-01609 (Or. 1994)) (on file with the *Fordham Law Review*)).

321. Interview with Phil Messina, President, Modern Warrior Defensive Tactics Institute, in Lindenhurst, N.Y. (Jan. 19, 2002) (notes on file with the *Fordham Law Review*).

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* Messina pointed out that persons suffering from tunnel vision, auditory exclusion, tachepsychia, and other perceptual distortions are unable to recall all of the details that may be important to the litigator's theory of the case. *Id.*

326. *Id.* In the Diallo case, defense attorneys were frustrated by the difficulties and complexities of putting together a defense based on the fragmented recollections of the four individual defendants, each of whom perceived the same event from strikingly different perspectives. To assist the defense team, Messina constructed a life-size recreation of the vestibule where the incident took place.

327. *Id.* Given the variety of relevant performance and perception factors, different experts will likely be needed to address the different areas. For example, to recreate the context of the event for the jury, a team might consist of an opthamologist to address visual acuity, a psychologist to address cognitive functioning, a medical doctor to explain the effects of epinephrine and other stress hormones, and a motor-skills trainer to explain biomechanics and movement.

in selecting the experts, particularly the experts' performance in previous trials.[328] Echoing the axiom of the law of evidence that "a brick is not a wall,"[329] Messina describes the role of the consultant as helping to "fill in the mortar between the bricks."[330] "The jury," he says, "wants to be able to see the whole picture. Consultants and experts can help the lawyer paint that picture."[331] To get the picture to the jury, the lawyer may rely on the consultant's assistance in developing the narrative that will be presented on opening and in summation. During case development and throughout the trial, the consultant can assist the attorney in developing a comprehensive approach to the argument. The consultant is able to see the relationships between the issues that the various experts address. Working together, the consultant and attorney can present a case in which the experts fill in missing pieces until the jury has gathered enough information to make an accurate determination of reasonableness under the circumstances.

C. *The Role of the Expert Witness at Trial*

At trial, the expert can provide a compelling, authoritative contribution to the narrative that unfolds. One expert witness who has proven valuable in use-of-force cases is Dr. Bill Lewinski, a professor and researcher at Minnesota State University.[332] Dr. Lewinski has testified effectively in use-of-force cases on the issues of perception and performance under stress.[333] Lewinski emphasizes that the challenge in a deadly force case is to help the jury understand how a person perceives and recalls the details of a life-threatening

328. *Id.* For the Diallo case, the defense team was acutely aware of the controversy in the public and the media that went well beyond the facts of that particular case. To counter the prejudice against the defendants, the defense presented a highly credible expert, selecting an expert who was known for testifying *against* police officers in civil suits. *See generally*, Fyfe, *supra* note 316, at 307 (revealing perspective on police use-of-force litigation).

329. *See* Fed. R. Evid. 401 advisory committee's note; *see also* United States v. Porter, 881 F.2d 878, 887 (10th Cir. 1989) ("'An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered.... It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence.... A brick is not a wall.'" (quoting 1 McCormick on Evidence § 185, at 542-43 (E. Cleary, 3d ed. 1984) (second alteration in original) (footnotes omitted in original))).

330. Interview with Phil Messina, *supra* note 321.

331. *Id.*

332. Dr. Lewinski has drawn on his professional experiences and research as a psychiatric social worker, counselor, and law enforcement trainer in assisting litigators in several state and federal use-of-force cases. *See* Resume of Dr. William Lewinski, *at* http://www.mankato.msus.edu//dept/psle/fac/Lewinski.html (last visited Apr. 8, 2002).

333. *See, e.g.*, Fuentes v. Thomas, 107 F. Supp. 2d 1288 (D. Kan. 2000); Marie McCain, *Expert Defends Roach's Decision*, Cincinnati Enquirer, Sept. 21, 2001, http://enquirer.com/editions/2001/09/21/loc_expert_defends.html (reporting on Lewinski's role in *People v. Roach*).

incident.[334] Evidence regarding the factors that affect perception may offer the jury a critical context in which to judge the credibility of the defendant's testimony.

In *Fuentes v. Thomas*,[335] for example, Dr. Lewinski's testimony contributed to a jury finding in favor of a police officer who had shot and killed a suspect during service of a warrant.[336] The estate of the suspect, Fuentes, sued Officer Thomas for using excessive force.[337] The plaintiff claimed Thomas fired two rounds that caused Fuentes to drop his gun, then paused before firing the third, fatal round.[338] Thomas, taking the stand in his own defense, testified that he had "locked eyes" with the suspect as he fired his weapon.[339] One of the three shots Thomas fired, however, struck Fuentes in the side, and another struck him in the back.[340] The plaintiff argued that, because the suspect had been hit in the side and back, Thomas must be lying, because he could not have maintained eye contact with a person who had turned away from the gunfire.[341]

Dr. Lewinski was admitted to testify for the defense on the issues of perception and suspect behavior.[342] Lewinski testified that Thomas's recollection of the event was consistent with principles of attentional narrowing and subject behavior.[343] Lewinski explained that there were several important, interrelated issues. First, Thomas's perception of seeing only the suspect's eyes was consistent with the phenomenon of "tunnel vision."[344] Second, the jury needed some understanding of the manner and speed by which Thomas operated his weapon.[345] Third, Lewinski addressed the speed and mechanics of the suspect's ability to turn his body.[346] Finally, the expert offered an explanation as to how these factors fit into Thomas's recollection of the event.[347]

Lewinski described the process as follows: Thomas saw Fuentes, and his vision narrowed down so that he perceived only the suspect's

334. Lewinski Interview, *supra* note 6.

335. 107 F. Supp. 2d 1288 (D. Kan. 2000).

336. *See* Tim Hrenchir, *Topeka Police Officer Receives 'Top Cop' Award*, Topeka Capital-Journal, Oct. 2, 1998, http://cjonline.com/stories/100298/com_police.shtml.

337. *Fuentes*, 107 F. Supp. 2d. at 1291.

338. *Id.* at 1294; *see also Sgt. Dave Thomas Cleared in Excessive Force Case, at* http://www.kscoplaw.com/goodnews.html. [hereinafter *Thomas Cleared*].

339. Lewinski Interview, *supra* note 6.

340. *Fuentes*, 107 F. Supp. 2d at 1294.

341. Lewinski Interview, *supra* note 6.

342. *Id.* Significantly, Lewinski passed the federal district court's application of the *Daubert* test, an encouraging sign toward the application of this type of psychological and physiological research to the area of use of force.

343. *Id.*

344. *Id.*

345. *Id.* In experiments conducted by the defense, Thomas found that he typically fired three shots from his service pistol in nine-tenths of a second.

346. *Id.*; *see also Thomas Cleared*, *supra* note 338.

347. Lewinski Interview, *supra* note 6.

eyes.[348] Next, his attention shifted to his own weapon, which he accurately fired in Fuentes's direction. While Thomas was cognitively occupied with shooting, however, Fuentes was not frozen in time or motion, he was naturally reacting to the gunfire coming in his direction, and he either flinched or intentionally turned away from the shots, completing a 360-degree turn. During the approximately nine-tenths of a second it took for Thomas to fire the rounds, Fuentes was able to turn his body completely around, ultimately appearing to present the same frontal angle as the one Thomas initially perceived.[349] Thomas was apparently unaware of Fuentes's spinning motion, and of his own perceptual shifts. Lewinski said that it is typical for a person to have a distorted recollection of events. The person places emphasis on the focus of the attentional narrowing (the suspect's eyes) as opposed to the contemporaneous operation of the weapon and the suspect's movement.[350]

After the trial was over, defense attorney David R. Cooper interviewed the jurors about the case.[351] The defense team learned that Lewinski's testimony had been critical in the jury's assessment of Officer Thomas's credibility.[352] Without it, they would have had no way to understand Thomas's insistence that he was locked eye to eye throughout the shooting.[353] Lewinski's testimony helped the jury understand how Thomas's perceptions and recollections of events could have been distorted under the circumstances of the shooting. Thomas's testimony was perplexing given the wound ballistics, yet Lewinski showed that he could nevertheless have been confused about his visual focus and still have acted reasonably and lawfully under the circumstances.[354] Dr. Lewinski has proven similarly effective in other cases.[355]

While most use-of-force experts probably know something about many of the various phenomena discussed in Part II, the court will only accept testimony from an expert who has researched, documented, and published specific, credible findings.[356]

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348. *Id.*

349. *Id.*; *see also* Lewinski, *supra* note 91, at 20; Hansen, *supra* note 273, at 38; McGuinness, *Shootings*, *supra* note 100, at 22 ("[I]t is not unusual for [justified] shots to enter a suspect in the side or in the back.").

350. Lewinski Interview, *supra* note 6.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *See, e.g.*, McCain, *supra* note 5 (crediting the testimony of Dr. Lewinski and opthamologist Dr. Paul Michel with persuading jury to acquit police officer who shot an unarmed man); *see also* Robert E. Pierre, *Officer is Acquitted in Killing that Led to Riots in Cincinnati; Judge: Shooting Death Wasn't Criminal*, Wash. Post, Sept. 27, 2001, at A2.

356. For example, a board certified therapeutic optometrist such as Dr. Paul Michel has developed expertise not only in his field of optometry, but also the

Consequently, litigators should look closely at the qualifications and professional accomplishments of prospective experts. It is also important to investigate whether the expert has a good ethical and professional reputation.[357]

D. *Limitations and Concerns*

Should defendants be liable or culpable for the dangerous conduct that may result from their mistaken beliefs? Attentional narrowing is not dispositive, it may be just one factor among the "totality of circumstances," but it seems logical that an inquiry into a defendant's reasonableness should consider perceptual distortions in evaluating the defendant's conduct and the credibility of his or her testimony. With respect to proving state of mind elements, such as willfulness, recklessness, or negligence, evidence of perceptual distortions could conceivably tilt the scales in the defendant's favor.

The studies discussed above show that individuals in dangerous situations are likely to experience dramatic perceptual distortions that will directly affect their ability to see, hear, and comprehend environmental stimuli. Given the law's emphasis on a defendant's reasonable belief in use-of-force cases,[358] perceptual distortions can offer a compelling explanation of seemingly irrational or culpable behavior. If a defendant has a reasonable but mistaken[359] perception of imminent harm and fails to notice sights or sounds that would otherwise prohibit the use of force, justification may still be a valid defense.[360] Justification, however, does not depend solely on an explanation of the perception. The defendant must show a logical

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application of that science to use-of-force scenarios. Dr. Michel has researched and published extensively on perceptual distortions in violent encounters, and has testified and consulted in several use-of-force litigations, including *Idaho v. Horiuchi*, 215 F.3d 986 (9th Cir. 2000) (affirming the acquittal of an FBI sniper who shot and killed an unarmed woman); *see also* resume of Dr. Paul Michel (on file with the *Fordham Law Review*).

357. Expert witnesses frequently suffer from the stigma of being a hired gun. To overcome this stigma at trial, the attorney should carefully investigate the expert's background for personal and professional issues that could impeach their credibility at trial. *See generally* Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 Geo. J. Legal Ethics 465 (1999); Justin P. Murphy, *Expert Witnesses at Trial: Where Are the Ethics?*, 14 Geo. J. Legal Ethics 217 (2000) (addressing stigmas associated with expert witness testimony).

358. *See supra* Part I.

359. *See* Schwartz et al., *supra* note 2, at 102 ("The privilege [of self-defense] exists when the defendant reasonably believes that the force is necessary to protect himself against battery, even though there is in fact no necessity.").

360. *See, e.g.*, People v. Boss, 701 N.Y.S.2d 342 (App. Div. 1999) (addressing circumstances in case where police officers raised defense of justification to charge of murder for shooting unarmed man, based on erroneous belief that the wallet in his hand was a gun); *see also* Lynne Duke, *Jury Acquits 4 N.Y. Officers: Panel Rules Police Acted Reasonably in Slaying of Amadou Diallo*, Wash. Post, Feb. 26, 2000, at A1.

relationship between the belief and the action he or she took in response to that perception.[361]

Studies like those conducted by Bruce Siddle and Phil Messina show that performance, like perception, is seriously influenced by stress in violent confrontations.[362] In considering the reasonableness of a defendant's conduct, especially in terms of the selection of alternative options, evidence of performance considerations such as reaction time, rate of travel, body mechanics, and reflexive responses can all be compelling and probative. It may be that, in many situations, prevalent expectations and preconceptions of appropriate behavior are inconsistent with the physiological realities in a life and death struggle.

Finally, litigators should consider the limitations and purpose of expert testimony. Testimony regarding perception and performance provides a useful context to determine credibility of witnesses and offers plausible explanations for seemingly irrational behavior, but it is neither practically nor legally sufficient to resolve the ultimate question at issue.[363] In all likelihood, the expert's testimony will merely offer scientific facts from which the jury may infer favorable findings about some elements of a client's behavior or credibility.

Because the science generally shows that perception and performance are diminished, witness credibility may also be adversely affected if the witness is claiming accurate and complete recall of events. The potential accuracy or fallibility of eyewitness testimony is a controversial and evolving issue, and is far from settled.[364] Additionally, there is some disagreement among psychologists as to the reliability and sufficiency of research into eyewitness perception.[365] In a broader sense, the recognition of perceptual distortions may further challenge the already shaky premise that any such inquiry into

361. *See* Nourse, *supra* note 28, at 1239 (stating that "response [must be] both necessary and proportionate").

362. *See supra* Part II.B.

363. *See, e.g.*, Hygh v. Jacobs, 961 F.2d 359, 363-64 (2d Cir. 1992). In *Hygh*, the plaintiff sued a police officer for civil rights violations, including excessive force, under 42 U.S.C. § 1983. A use-of-force expert for the plaintiff testified that the officer struck the plaintiff with a flashlight, and that in so doing he used deadly physical force unreasonably. *Id.* The Second Circuit was troubled by the legally conclusory nature of the expert's testimony. The Court found that "[the expert] testified that Jacobs' conduct was not justified under the circumstances, ... [This] testimony regarding the ultimate legal conclusion entrusted to the jury crossed the line and should have been excluded." *Id.* at 364 (internal quotations omitted).

364. *See, e.g.*, Thomas Dillickrath, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. Miami L. Rev. 1059 (2001); Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. Air L. & Com. 1421 (2001).

365. Howard Egeth, *Emotion and the Eyewitness*, *in* The Heart's Eye, *supra* note 234, at 245, 257 ("[I]t is still too soon to tell juries anything useful about the effects of arousal on the accuracy of eyewitness testimony.").

the circumstances of a violent confrontation may be truly objective.[366] Existing axioms of self-defense law may suffer from an increasing lack of certainty, and the practice of law in the area of self-defense may become less and less predictable.

Nonetheless, in the absence of scientific evidence about human behavior and perception in violent situations, jurors are left to speculate about a host of critical issues, such as the feasibility of alternatives, the likely sufficiency or insufficiency of the amount of force applied, and the credibility of a defendant's narrative, to name but a few. While each use-of-force case is unique on its facts, the science shows that there are general principles that can and should be applied to an analysis aimed at determining reasonableness in extreme circumstances.

CONCLUSION

While different types of use-of-force cases involve distinct legal and factual concerns, the common thread that runs through them is the inquiry into the reasonableness of specific conduct under extraordinary circumstances. To justify or mitigate the often unsettling nature of a use of force, a defendant must show that her response was both reasonable and appropriate, whether based on her own belief (subjective inquiry) or on the belief of a reasonable person under the same circumstances (objective inquiry). Under either standard, however, the jury ultimately must judge whether the perceptions, beliefs, and responses in question were proper.

Scientific researchers have developed a body of knowledge that can assist the fact-finder in the determination of reasonableness. To perform a reasonableness analysis absent consideration of the profound effects of stress on perception and performance denies the jury relevant and probative contextual information. At the very least, the lawyer trying the case should be aware of such factors in developing a case strategy. The application of scientific evidence, through available scientific research, consultants, and expert witnesses, can lead to fairer findings in self-defense, police use-of-force, and domestic violence cases. In fact, such evidence may be applicable to all types of cases where critical decisions are made under extreme stress.

366. *See* Nourse, *supra* note 28, at 1237 ("The law of self-defense . . . is far from as settled or coherent as it is assumed to be; its meaning and theory remain . . . largely unresolved. What seems so objective—the status quo—turns out to be a good deal more complex and contingent than has been assumed.").